149 US 645

IN THE

Supreme Court of the United States

..... Term, 1892.

JOHN McNULTY,
Plaintiff in Error,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

No. 1253

TRANSCRIPT OF RECORD.

In Error to the Supreme Court of the State of California.

CARROLL COOK,
Attorney for Plaintiff in Error.

W. H. H. HART,
Attorney-General of California,
Attorney for Defendant in Error.

Filed November ....., 1892.

SACRAMENTO:
STATE OFFICE : : A. J. JOHNSTON, SUPT. STATE PRINTING.
1892.

INDEX.

RECORD IN SUPREME COURT OF THE UNITED STATES.

	Page.
Transcript from Supreme Court of the State	1–137
Clerk's Certificate to Transcript	137
Petition for Writ of Error	124–128
Assignment of Errors on Writ	122
Writ of Error	3
Proof of Service of Writ	4–5
Citation	1
Proof of Service of Citation	2–3

(*a*)

TRANSCRIPT IN SUPREME COURT OF STATE.

Information	6
Arraignment and Plea	7–8
Verdict	15
Notice of Appeal	38
Sentence	37
Corrected Sentence	64–65
Instructions	15–36
Corrected Instructions	41–62
Certificate of Judge to Instructions	39–40
Diminution of Record	39–40
Certificate to Judgment Roll	37

(*b*)

OPINIONS AND ORDERS OF STATE SUPREME COURT.

First Opinion of Court (Department One)	66–68
Order Granting a Rehearing	69
Second Opinion of Court (in bank)	69–91
Dissenting Opinion	91–110
Second Rehearing Granted	111
Third Opinion of Court (in bank)	111–119
Second Dissenting Opinion	119
Substitution of Attorneys	69
Petition for Allowance of Writ of Error	120
Assignment of Errors on Petition	122
Order Staying Remittitur	123
Writ Denied	123
Judgment Affirmed	68, 91, 119
Remittitur Issued	123

IN THE

Supreme Court of the United States.

JOHN McNULTY, Plaintiff in Error,

vs.

2 **THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.**

Transcript and Record in said Cause as certified by the Clerk of the Supreme Court of the State of California.

STATE OF CALIFORNIA, } ss.
City and County of San Francisco. }

I, L. H. Brown, Clerk of the Supreme Court of the State of California, in pursuance to the writ of error, supersedeas, and citation to the People of the State of California, forwarded herewith, and which are in the
3 words and figures following, to wit:

UNITED STATES OF AMERICA—ss.

To the People of the State of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court, at the State of California, wherein John McNulty is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered

4 against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Lucius Q. C. Lamar, Associate Justice of the Supreme Court of the United States, this fourth day of October, in the year of our Lord one thousand eight hundred and ninety-two.

L. Q. C. LAMAR,

Associate Justice of the Supreme Court of the United States.

Indorsed: On this 13th day of October, in the year of our Lord one thousand eight hundred and ninety-two,
5 personally appeared Carroll Cook before me, the subscriber, L. H. Brown, Clerk of the Supreme Court of the State of California, and makes oath that he delivered a true copy of the within citation to W. H. H. Hart, the Attorney-General of the State of California, through a clerk in his office, and to the Sheriff of the City and County of San Francisco, State of California, through P. Deveny, Under Sheriff of said city and county.

CARROLL COOK.

Sworn to and subscribed the 13th day of October, A. D. 1892.

(Seal of the Supreme Court of Cal.)

L. H. BROWN,
6 Clerk of the Supreme Court.
By GEO. A. MCCALVY, Deputy.

Indorsed: Due service of within citation, and receipt of a true copy thereof, is hereby admitted by the People of the State of California, this 13th day of October, 1892, at San Francisco, Cal.

WM. H. H. HART,
Attorney-General of the State of California.
By BETZ.

Indorsed: Due service of the within citation, and a receipt of a true copy thereof, is hereby admitted, this

13th day of October, 1892, at the City and County of San Francisco, State of California.

C. S. LAUMEISTER,
Sheriff of the City and County of San Francisco, State of California.
By P. DEVENY, Under Sheriff.

Filed October 12th, 1892.
L. H. BROWN, Clerk.
By GEO. A. MCCALVY, Deputy.

UNITED STATES OF AMERICA—SS.

The President of the United States of America, to the honorable the Judges of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between John McNulty, appellant, and the People of the State of California, respondents, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, and privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said John McNulty, as by his complaint appears.

10 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty (60) days from date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to
11 correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 4th day of October, in the year of our Lord one thousand eight hundred and ninety-two.

(Seal of the Supreme Court of U. S.) JAMES H. McKENNY,

Clerk of the Supreme Court of the United States.

Allowed by L. Q. C. Lamar, Associate Justice of the Supreme Court of the United States.

The writ of error to operate as a supersedeas.

LAMAR,

12 Justice.

Indorsed: Due service of within writ of error and supersedeas, and receipt of a true copy thereof, is hereby admitted by the People of the State of California, this 13th day of October, 1892, at San Francisco, Cal.

WM. H. H. HART,

Attorney-General of the State of California.

By BETZ.

Indorsed: Due service of the within writ of error and supersedeas, and receipt of a true copy thereof, is

hereby admitted, this 13th day of October, 1892, at the City and County of San Francisco, State of California.

C. S. LAUMEISTER,

Sheriff of the City and County of San Francisco, State of California.

By P. DEVENY, Under Sheriff.

Filed October 12, 1892.

L. H. BROWN, Clerk.

By GEO. A. MCCALVY, Deputy.

Do hereby certify that the following constitutes a true and correct copy of the record in cause No. 20,659, heretofore pending in the Supreme Court of the State of California, wherein the People of the State of California was respondent, and John McNulty appellant, and the same contains a copy of all the opinions of the Supreme Court of the State of California filed in said cause; and also that I have incorporated the assignment of errors which said John McNulty claims should be considered by the Supreme Court of the United States, and which have been filed in this cause, together with all proceedings taking place in said cause in said Supreme Court of the State of California.

I further certify that on the 20th day of February, 1890, there was filed in the Supreme Court of the State of California a Transcript in the case of *The People of the State of California*, respondent, vs. *John McNulty*, appellant, in the words and figures following, to wit:

No. 20,659. In the Supreme Court of the State of California. The People of the State of California, respondents, vs. John McNulty, appellant. Transcript on Appeal to the Supreme Court.

Wilson & Troutt, attorneys for Appellant. J. D. Page, Esq., District Attorney, attorney for Respondents.

Filed this 20th day of February, 1890. J. D. Spencer, Clerk. By J. J. Paulsell, Deputy Clerk.

16 **Information.**

[Title of Court and Cause.]

In the Superior Court of the City and County of San Francisco, State of California, the 26th day of April, A. D. 1888, John McNulty is accused by the District Attorney, by this information, of the crime of felony, to wit, murder, committed as follows:

The said John McNulty, on the 25th day of March, A. D. 1888, at the said City and County of San Francisco, did then and there, willfully, unlawfully, feloniously, and of his malice aforethought, kill and murder one James Collins, contrary to the form, force, and effect of the statute in such cases made and provided, and
17 against the peace and dignity of the people of the State of California.

E. B. STONEHILL,

District Attorney of the said City and County of San Francisco.

Witnesses: Michael Daly, John J. O'Connor, Patrick Morgan, Walter Burke, Michael Halpin, Michael Donlan J. P. Richardson, and F. B. Carpenter.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

I, William J. Ruddick, County Clerk of the City and
18 County of San Francisco, State of California, and Clerk of the Superior Court thereof, do hereby certify the within to be an original information, presented and filed by the District Attorney of the said City and County of San Francisco, in the said Superior Court, on the 26th day of April, A. D. 1888, and made a record thereof.

In witness whereof, I have hereunto set my hand and seal of the said Court, this 26th day of April, A. D. 1888.

WM. J. RUDDICK, Clerk.

[SEAL.] By J. W. EGAN, Deputy.

19 Indorsed: Presented and filed by the District Attorney in the Superior Court of the City and County of San Francisco, State of California, and made a record thereof, this 26th day of April, A. D. 1888.

WM. J. RUDDICK, Clerk.
By J. W. EGAN, Deputy.

E. B. STONEHILL, District Attorney.

Order Assigning Cause.

[Title of Court and Cause.]

APRIL 26, 1888.

20 It is ordered that the above entitled cause, presented by the District Attorney, and filed in the Superior Court of the City and County of San Francisco, State of California, on the 26th day of April, A.D. 1888, be and the same is hereby assigned to Hon. D. J. Murphy, Judge Department No. 12 of this Court, for trial and determination.

JNO. F. FINN,
Presiding Judge of the Superior Court.

Indorsed: Filed April 26, 1888.

WM. J. RUDDICK, Clerk.
By J. W. EGAN, Deputy Clerk.

21

Arraignment.

[Title of Court and Cause.]

SATURDAY, April 28, A. D. 1888.

Present: Hon. D. J. Murphy, Judge.

The defendant came into Court, answered that his true name is John McNulty, and that Mr. Wilson is his counsel.

The information charging said defendant with the crime of murder was read and a copy thereof furnished

22 counsel; upon being called upon the defendant pleads not guilty of the crime charged in the information.

Continuance.

[Title of Court and Cause.]

MONDAY, May 28, A. D. 1888.

Present: Hon. D. J. Murphy, Judge.

Defendant and counsel present affidavits of defendant in support of a motion for a continuance of the trial of this cause filed in open Court, and read upon said motion. Continuance granted. Cause continued for trial until July 9, 1888.

23 MONDAY, July 9, 1888.

Present: Hon. D. J. Murphy, Judge.

Upon motion of counsel for the defendant, cause continued for trial until July 30, 1888.

Trial.

[Title of Court and Cause.]

MONDAY, July 30, A. D. 1888.

Present: Hon. D. J. Murphy, Judge.

This cause came on regularly for trial. Defendant and counsel present.

24 The following jurors were duly drawn and sworn to answer questions touching their qualifications to serve as jurors in this cause:

Alfred Vint, Peter Creegan, E. Pennington, John Miller, J. B. C. Morris, Ephraim Frank, James Green, John Sanders, George W. Conklin, Henry S. Bunker, C. G. Frederick, Henry Finkenstedt.

Whereupon Alfred Vint was challenged by the defendant for actual bias. The challenge was disallowed and defendant excepts.

Peter Creegan was examined and passed.

25 E. Pennington was challenged by defendant on the ground of actual bias. The challenge was allowed and the juror excused.

John Miller was challenged by the people for implied bias and excused.

J. B. C. Morris was examined and passed.

Ephraim Frank was challenged by the defendant for actual bias and excused.

James Green was challenged by defendant for actual bias. The challenge was disallowed and defendant excepts.

John Sanders was challenged by defendant for actual
26 bias and excused.

Geo. W. Conklin was examined and passed.

Henry S. Bunker was challenged by the defendant for actual bias and excused.

C. G. Frederick was challenged by defendant for actual bias. The challenge was disallowed and defendant excepts.

Henry Finkenstedt was examined and passed.

Whereupon J. B. C. Morris and Geo. W. Conklin were accepted, empaneled, and sworn to try this cause.

Whereupon Harrison Barto, E. E. Wenzel, Elisha Freeman, Charles Hess, Arthur W. Bull, Julius Levy, Henry Newhouse, Wm. Pourin, John Rohde, and Geo.
27 W. Morgan were duly drawn and sworn to answer questions touching their qualifications to serve as jurors in this cause.

Whereupon the jurors were admonished and excused until 2 P. M.

It appearing to the Court, that of the panel of jurors regularly and specially summoned for this Court, there remains an insufficient number to complete the panel for the trial of this cause, it is thereupon ordered by the Court that the Sheriff of the City and County of San

28 Francisco, State of California, forthwith summon from the body of the county, but not from the bystanders, fifty good and lawful men to complete the panel for the trial of this cause, and such persons shall have the necessary qualifications of jurors. And it is further ordered that the persons summoned as aforesaid, be and appear before this Court, at the court-room thereof, in the Old City Hall, on Kearny Street, in the City and County of San Francisco, ten at 2 P. M., and forty on the 31st day of July, A. D. 1888, at the hour of 10 o'clock A. M. of said day.

Recess until 2 P. M.

29 After recess Court met. Present: Hon. D. J. Murphy, Judge. Defendant and counsel present. The jurors sworn to try this cause, and the jurors sworn to answer questions, all answered.

Whereupon the Sheriff came into Court, and, in obedience to an order for the summoning of ten jurors, returnable at 2 P. M., makes and files the following:

Return of names of persons duly summoned to serve as jurors in this cause.

Whereupon Harrison Barto, E. E. Wenzel, Charles Hess, Wm. Pourin, John Rohde, and Geo. W. Morgan were examined and passed.

Elisha Freeman was challenged by the People for
30 implied bias and excused.

A. W. Bull and Julius Levy were challenged by the defendant for actual bias. The challenges were disallowed and the defendant excepts.

Henry Newhouse was challenged by the people for implied bias and excused.

Whereupon Alfred Vint, James Green, C. G. Frederick, Henry Finkenstedt, Harrison Barto, A. W. Bull, Julius Levy, and John Rohde were peremptorily challenged by defendant and excused.

31 Peter Creegan was peremptorily challenged by the people and excused.

Whereupon E. E. Wenzel, Chas. Hess, Wm. Pourin, and Geo. W. Morgan were accepted, empaneled, and sworn to try this cause.

Whereupon the following jurors were duly drawn and sworn to answer questions as to their qualifications to serve as jurors in this cause: Richard Pahl, Henry Helfrisch, C. A. Rand, M. J. Kast, F. S. Chandler, S. Waterman.

Whereupon Richard Pahl was challenged by the People for implied bias and excused.

32 Henry Helfrisch was excused by consent, on the ground that he does not understand English.

C. A. Rand, M. J. Kast, and S. Waterman were examined and passed.

F. S. Chandler was challenged by the People, on the ground that he was not on the last assessment roll, and excused.

Whereupon C. A. Rand, M. J. Kast, and S. Waterman were accepted and empaneled and sworn to try this cause.

Whereupon the jurors were admonished and excused until to-morrow at 10 A. M.

33 TUESDAY, July 31, A. D. 1888.

Present: Hon. D. J. Murphy, Judge.

Defendant and counsel present.

Whereupon L. F. Hampton and H. Duncan and B. C. Austin were drawn and sworn to answer questions touching their qualifications to serve as jurors in this cause, examined and passed.

Whereupon L. F. Hampton and H. Duncan were peremptorily challenged by defendant and excused.

B. C. Austin was accepted, empaneled, and sworn to try this cause.

34 Whereupon W. Manning and J. M. Pierce were drawn and sworn to answer questions touching their qualifications to serve as jurors in this cause.

W. Manning was examined and passed.

J. M. Pierce was challenged by defendant for actual bias and excused.

Whereupon W. Manning was accepted, empaneled, and sworn to try this cause.

Whereupon W. Fleisher was drawn and sworn to answer questions touching his qualifications to serve as a juror in this cause.

The juror was examined, passed, accepted, empaneled,
35 and sworn to try this cause.

The jury being complete as follows:

1. J. B. C. Morris,
2. George W. Conklin,
3. E. E. Wenzel,
4. Charles Hess,
5. Wm. Pourin,
6. Geo. W. Morgan,
7. C. A. Rand,
8. M. J. Kast,
9. S. Waterman,
10. B. C. Austin,
11. Wm. Manning,
12. W. Fleisher.

Whereupon the information was read to the jury, and defendant's plea of not guilty, and his true name, John McNulty, stated.

Whereupon the jurors were admonished by the Court
36 as to their duty, and excused until to-morrow at 10 A. M.

WEDNESDAY, August 1, A. D. 1888.

Present: Hon. D. J. Murphy, Judge.

Defendant and counsel present.

The jury was called, and all answered.

Whereupon Michael Halpin, Dr. Chas. Blach, Lawrence Buckley, Thomas Meehan, and John Nee, were sworn and examined as witnesses for the People.

The testimony of Patrick Morgan, taken in the Police Judge's Court, was read by consent, on behalf of the People.

37 The People rest.

The jurors were admonished and excused until 2 P. M.

Recess until 2 P. M.

WEDNESDAY, August 1, A. D. 1888.

Court met after recess. Present: Hon. D. J. Murphy, Judge.

Defendant, counsel, and jury present.

Whereupon Michael Halpin was recalled, and further cross-examined by defendant.

Whereupon J. B. Brown and George W. Haskell were sworn and examined as witnesses for the People.

The People rest.

38 Whereupon Mrs. Bridget McNulty, Henry J. Wolters, Peter Featherstone, John Janey, David McDonald, William Sanders, Harry W. Peterson, Michael Lynch, Mrs. Kate McNulty, John Gibbons, and Julius Koosher were sworn and examined as witnesses for the defendant.

Whereupon the testimony of Michael Daly and J. J. O'Connor, taken in the Police Judge's Court, was read, by consent, on behalf of defendant.

The jurors were admonished, and excused until to-morrow at 10 A. M.

THURSDAY, August 2, A. D. 1888.

Court met. Present: Hon. D. J. Murphy, Judge.

39 Defendant, counsel, and jury present.

Whereupon Dr. J. M. Eaton, John McAuliffe, Thomas Coghlin, and John McNulty were sworn and examined as witnesses for the defendant.

Defendant rests.

Whereupon Joseph J. Cuello, Michael Morton, Peter Thornton, John McDonough were sworn and examined as witnesses for the People, in rebuttal.

The jurors were admonished, and excused until 2 P. M.

Recess until 2 P. M.

40 THURSDAY, August 2, A. D. 1888.

Court met after recess. Present: Hon. D. J. Murphy, Judge.

Defendant, counsel, and jury present.

Whereupon John Clark, J. B. King were sworn and examined as witnesses for the People, in rebuttal.

The jurors were admonished, and excused until to-morrow at 10 A. M.

FRIDAY, August 3, A. D. 1888.

Court met. Present: Hon. D. J. Murphy, Judge.

Defendant, counsel, and jury present.

Whereupon A. P. Hayne, M.D., C. F. Buckley, M.D.,
41 F. B. Kane, M.D., were sworn and examined as witnesses for the People, in rebuttal.

The People rest.

Defendant rests.

Whereupon the jurors were admonished, and excused until 2 P. M.

Recess until 2 P. M.

FRIDAY, August 3, A. D. 1888.

Court met after recess. Present: Hon. D. J. Murphy, Judge.

Defendant, counsel, and jury present.

Whereupon argument by counsel for the People and
42 the defendant.

Whereupon the jurors were admonished, and excused until Monday, August 6, 1888, at 10 A. M.

MONDAY, August 6, A. D. 1888.

Court met. Present: Hon. D. J. Murphy, Judge.

The defendant, counsel, and jury present.

After an oral charge by the Court, the jury retired in charge of a sworn officer, to deliberate upon their verdict, and, subsequently returning into Court and answering to their names, say:

43 "We, the jury, find the defendant, John McNulty, guilty of murder in the first degree;" and so say they all.

Upon motion of counsel for defendant, the jury was polled, and each juror answering to his name, said that was his verdict, as above recorded; and so say they all.

August 11, 1888, set for the pronouncing of judgment.

August 25, 1888, set for the pronouncing of judgment.

Charge to the Jury.

[Title of Court and Cause.]

Gentlemen of the Jury:

44 You will please give me your earnest and careful attention while I give you in charge and explain to you such principles of law as are applicable to the case now about to be submitted to you. And in passing, permit me to say to you that I have no doubt, from the careful attention that you have given the case up to the present moment, that you will continue to give it the same thoughtful and careful consideration till you determine the question to be settled by your verdict.

I desire to say to you that in the charge I am now giving, you will please understand that the Court, in no manner or form, intends or wishes you to understand that the Court is expressing any opinion on the weight

45 of evidence, or the truth or falsity of any witness' statement, or that any fact in the case is or is not proven. The Court has nothing to do with the question of fact, the weight that should be given to the testimony, and the credit that you shall give to any and all the witnesses in the case. These are matters peculiarly within your province, and which you, as jurors, under your oath must determine for yourselves.

The defendant at the bar, John McNulty, is accused by the District Attorney of this city and county by an information filed in this Court, in and by which he is charged

46 with the crime of murder, alleged to have been committed in this city and county on the 25th day of March, 1888, in the manner following, that is: that he, the said John McNulty, did then and there willfully, unlawfully, feloniously, and of his malice aforethought, kill and murder one James Collins.

To this information thus presented, the defendant has interposed his plea of not guilty, which puts in issue every material allegation of the information, and it devolves upon the prosecution to establish to your satisfaction and beyond all reasonable doubt that the defendant is guilty as charged, or of some other offense or
47 degree of crime included within the charge as will be hereafter more particularly explained to you.

In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics nor affected with insanity. On this question of intent, gentlemen, as I have said before, you must arrive at it from all the circumstances surrounding the commission of the alleged act, which is charged to be criminal, and from all the evidence in the case. Of course you all understand
48 that we cannot look into the mind of a man and see what its workings are; we cannot bring a photograph of the mind of a man and exhibit it to you so as to determine clearly and absolutely what the workings of a human being's mind are. Hence, from necessity the law says that you shall gather the intention with which an act is done from all the circumstances surrounding its commission, and from all the evidence appearing in the case before you.

The word "willful," when applied to the intent with

which an act is done or omitted, implies simply a purpose or willingness to commit the act or to make the omission referred to.

The words "malice" and "malicious" import a wish to vex, annoy, or injure another, and, as our Supreme Court say: "While in its popular sense it may denote mere hatred and ill-will, yet in its legal sense, malice means an act done intentionally and unlawfully, and with the intent to injure another, without legal justification or excuse, and is proved either by proof or presumption of law."

You are not bound to decide in conformity with the declaration of any number of witnesses which does not produce conviction in your minds against a less number of witnesses or against a presumption of law satisfying your minds. A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole or any part of the testimony of any witness who has willfully sworn falsely as to a material point or fact in the case, and if you believe that any witness in this case has willfully sworn falsely to any material matter or fact in the case with a design to deceive you, you must treat all his testimony with distrust and suspicion, and may reject all or any part of the same.

A malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another. All the presumptions of law independent of evidence are in favor of innocence, and every person accused of crime is presumed to be innocent till his guilt is established to your satisfaction and beyond all reasonable doubt. Every material fact necessary to establish the guilt of the defendant of the offense charged, or any degree of crime included within the charge and information, must be established by the prosecution beyond all reasonable doubt.

52 By this term reasonable doubt is not meant every possible or fanciful doubt or conjecture that may suggest itself or be suggested to your minds. It is not a mere guess or a surmise, because everything relating to human affairs and dependent upon moral evidence is open to some fanciful doubt or conjecture. But a reasonable doubt is a fair doubt based upon reason and growing out of the testimony in the case. In the words of our Supreme Court, a reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves your minds in that condition that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge.

53 Now, while the prosecution is obliged to establish the guilt of the defendant beyond all reasonable doubt, you will not understand that it must establish such guilt to an absolute certainty or to a demonstration, because such degree of proof is rarely, if ever, attainable in a Court of justice. A defendant in a criminal case may establish any fact necessary for him to establish in his defense by a preponderance of evidence; that is to say, that the evidence in favor of the fact sought to be established by the defense is, in some degree, greater in its favor than the evidence which is against it. A defendant is never obliged to establish any fact in his defense to a

54 moral certainty and beyond all reasonable doubt.

Evidence has been introduced here on behalf of the defendant as to his previous character for peace and quietness; and, inasmuch as the law at the outset clothes the defendant in a criminal case with the presumption of innocence, when the proof on the part of the prosecution tends to overthrow this presumption, and fix upon the defendant the commission of a crime, he is then permitted to support the original presumption of innocence by proof of good character for peace and quietness, being

the traits involved in this charge. The good character and reputation of a defendant upon trial, for peace and quietness, in a charge of this kind, is itself a fact in the case. It is a circumstance tending in a greater or less degree to show his innocence; and therefore, in this case, the good character of the defendant, if proved to your satisfaction, is to be considered by you in connection with all the other facts and circumstances of this case in determining the question of the guilt or innocence of the defendant. It should be weighed, if proved, as any other fact in the case, and it may be sufficient of itself to create a reasonable doubt as to his guilt, when no such doubt might exist were it not for the evidence of previous good character; but, notwithstanding a person may prove a previous good character for the traits involved in the charge, yet if you are satisfied of his guilt of the offense charged, or any degree of crime included within the offense, it is your duty to convict of such crime as you may be so satisfied of his guilt of, notwithstanding such evidence of previous good character.

You are the sole judges of the credibility of the witnesses, and of each of them, and of the testimony in the case. You will weigh carefully the testimony of each and all the witnesses in the case, and give to the same just such credit as you conscientiously believe it entitled to; and in considering what weight you will give to the testimony of any and all the witnesses in the case, you will consider the character and appearance of the witness upon the stand; the consistency and reasonableness of their statements; their apparent interest and desire to tell the truth; their feelings, motives, and conduct, so far as made known to you during the trial of this case.

Among the witnesses who have taken the stand here is this defendant. This is his legal right, and you are not to disregard or discredit his testimony simply and solely

58 because he is the defendant and accused of crime. But you are to judge of his testimony fairly and apply the same tests as far as they are applicable to his testimony that you apply to all the witnesses in the case. It is proper for you to bear in mind, in weighing the credit and value that you will give to his testimony, the relation that he bears to the case and the situation that he finds himself in; the manner in which he testifies and the manner in which he may be affected by the verdict. These and such other proper tests as may suggest themselves to you, you should apply in weighing his testimony, and also with all the other witnesses in the case.

59 Now, gentlemen, as I have stated to you, the information in this case charges the defendant, John McNulty, with the crime of murder. And within this information are included the following crimes or degrees of crime, any one of which you may convict the defendant of if you are satisfied of his guilt thereof to a moral certainty and beyond such reasonable doubt as I have explained to you. Then the first and the greatest offense charged here is murder of the first degree. The second offense or degree of crime charged and included in this information is murder of the second degree; and the third degree of crime charged and included in this information is that of manslaughter. Murder is defined by our Penal Code to

60 be the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifest a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart. All murder which is perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration

or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree, and all other kinds of murder are of the second degree. There is no presumption of law that a homicide is murder in either degree; but whether it is either murder or manslaughter depends upon the facts and circumstances under which the act of homicide was committed.

Under the information in this case the defendant may, if in your judgment the facts warrant it, be convicted of manslaughter. This is defined by our Penal Code to be the unlawful killing of a human being without malice. It is of two kinds: (1) voluntary, upon a sudden quarrel or heat of passion; (2) involuntary, in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection. To reduce a felonious homicide from the grade of murder to that of manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of such a character as would be naturally calculated to excite and arouse the passions; and it must appear also that the party acted under the smart of this sudden passion and resentment. In such a case the law, commiserating the frailty of human nature, withdraws the offense from the higher class in which malice and deliberation characterize the act and tempers its judgment accordingly. If, however, the provocation was of a slight or trifling character, of such a nature as would not be calculated to arouse passion, or if sufficient time had elapsed between the provocation given and the fatal blow struck, or the fatal shot fired, for passion to subside and reason to resume its empire, the offense will not be mitigated, but the slayer will be guilty of murder

A person must be supposed to mean to do that which he actually and intentionally and willfully does in fact

64 do, and must also be presumed to intend all the probable and natural and usual consequences of his voluntary act. Therefore, when one person assails another with a deadly weapon, a weapon likely and calculated to, and which does in fact destroy the life of the party assailed, the natural and legal presumption is that such assailant intended serious injury upon the person of the party assailed, and in the absence of evidence to the contrary overcoming the same, this legal presumption must prevail. The willful and unlawful use of a deadly weapon without just cause, or legal excuse or provocation, in such a manner as to imperil human life, generally indicates a
65 felonious intent; and the law, therefore, presumes that every one who deliberately and intentionally fires a pistol at another, and within a few feet of him, intending to kill him, does such act willfully, and would imply malice, and should such person thus fired at die from the effects of such shot, it would be murder, unless the evidence on the part of the prosecution tends to show that the crime committed amounted only to manslaughter, or the evidence in the case showed that the accused was legally justified or excusable in the commission of such homicide.

In this case, gentlemen, it is not claimed by the prosecution that the homicide was committed in the perpe-
66 tration or attempt to perpetrate any other felony, but it is claimed that it is murder in the first degree, as being unlawful, malicious, willful, deliberate, and premeditated. In this class of cases the Legislature leaves the jury to determine, from all the evidence before them, the degree of the crime, but prescribes for the government of their deliberations the same test, which is: Is the killing willful, deliberate, and premeditated? The unlawful killing must be accompanied with a deliberate and clear intent to take life, in order to constitute the crime of murder in

the first degree. The attempt to kill must be the result of deliberate premeditation. It must be formed upon a preëxisting reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable space of time between the intent to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind.

It is only necessary that the act of killing be preceded by a concurrence of the will, deliberation and premeditation on the part of the slayer, and if such is the case, the killing is murder in the first degree, no matter how rapidly these actions of the mind may succeed each other, or how quickly they may be followed by the act of killing. From this definition you will see that any unlawful killing of a human being, with malice aforethought, is murder, but if nothing further characterizes the offense, it is murder in the second degree. To constitute the higher offense of murder in the first degree, there must be superadded to the general definition above given, willfulness, deliberation, and premeditation. By willfulness is meant that it is of purpose with the intent, that by the given act the life of the party should be taken. It must be deliberate and premeditated, as I before stated, to constitute murder of the first degree. By this is not meant that the killing must be conceived or intended for any particular length of time. It is sufficient if it was done with reflection and conceived beforehand. And in this view, as I have stated before, the deliberate purpose to kill and the killing may follow each other as rapidly as successive thoughts of the mind. "A man," says our Supreme Court, "may do a thing willfully, deliberately, and intentionally from a moment's reflection as well as after pondering over the subject for a month or a year. He can premeditate, that is think, before doing an act the moment he conceived the purpose, as well as if the act

was the result of a long preconcert and preparation. There is nothing in the section of the Penal Code relating to this subject which indicates that the Legislature meant to assign any particular period to this process of premeditation or deliberation in order to bring the act within the first degree." It is enough that the party deliberated before the act, premeditated the purpose to slay before he fired the fatal shot. But, while the fatal purpose or intent and its execution may follow thus rapidly upon each other, it is proper for you to take into consideration the shortness of such interval, if such be the fact, in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger, rather than to deliberation and premeditation which must characterize the higher offense. You will see from what I have stated that the distinction between the two grades of murder is that in murder of the first degree, unless it was committed in the perpetration or attempt to perpetrate one of the felonies mentioned, the killing must be deliberate and premeditated, whilst in murder in the second degree the killing is not deliberate or premeditated. In the one case there is a deliberate premeditation, a preconceived design, though it may have been formed in the mind immediately before the mortal wound was given, to take life; in the other there is no deliberation, premeditation, or preconceived design to kill. In order to constitute murder in either degree, the killing must have been unlawful and accompanied with malice.

In this case if you find from the evidence that the defendant fired the fatal shot which caused the death of the deceased at the time and place mentioned in the information, then the burden of proving circumstances in mitigation, or that justifying or excuse the homicide, devolves upon the defendant, unless the proof upon the part of the prosecution tends to show that the crime

73 committed only amounts to manslaughter, or that the defendant was justifiable or excusable in his act.

Now, gentlemen, in this case it is claimed by and on behalf of the defendant, that on the 25th day of March, 1888, on which it is alleged by the prosecution that he took the life of deceased, that the accused was insane, and by reason thereof if he did ~~not~~ take the life of the deceased he is not responsible or punishable therefor, by reason of such insanity, and should be acquitted. It is my duty to say to you that against such defense the law entertains no prejudice; on the contrary, if it be established, by preponderance of evidence, the law accords to
74 the accused the full benefit of it, and your duty will be to acquit him of all criminal responsibility by reason of his insanity. It may by true that this defense is sometimes resorted to in cases in which the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. It may have been abused and used in cases of unquestionable guilt, and may have been the excuse for juries acquitting when their own and the public sympathy has been with the accused party, and justified and excused according to popular sentiment but not according to law. While, therefore, all this may be true, yet it is a defense to be weighed fairly, fully, and justly, and
75 when proved in the manner I shall state and explain to you, must recommend itself to the sense of humanity and the justice of the jury. You are to examine it with care and caution, however, lest an ingenious counterfeit of this mental infirmity should furnish immunity from and perhaps defeat proper and just punishment.

In considering and protecting the unfortunate insane class, which appeals so loudly to our sympathies, great care should be taken that we do not break down all legal barriers to crime and leave society to the mercy of those

L. H. Brown
Clerk

76 whose evidence of insanity may consist only in their own depravity. This defense should be carefully scanned, not with a foregone conclusion to disallow it as a pretense, nor with undue bias in its favor, but with a firm determination, without partiality or prejudice, to give the testimony submitted on this subject its due weight—nothing more or nothing less.

Our Penal Code provides that all persons are capable of committing crime except those belonging to certain specified classes, among which are idiots, lunatics, and insane persons, and further provides that all persons are of sound mind who are neither idiots, lunatics, nor affected with
77 insanity. It is undoubtedly the law that when, by reason of disease, the mind has become so affected as to render a person unconscious of the act he is doing, and which is charged as criminal against him, or that he does not know the act he is doing is wrong, and is not capable of distinguishing between right and wrong as to such act, then such a person is not accountable for such act, and not punishable for its commission. And the main and true test binding upon the Court, and upon you, the jury, is: Was the accused, at the time of doing the act complained of, conscious of the act he was doing? Did he know at the time it was wrong to do it? Had he at the time the power of distinguishing good from evil,
78 right from wrong, as to the act he was doing? Had he mental capacity to appreciate the nature and quality of the act he was doing, or to know that it was a violation of the rights of another, in itself wrong, and prohibited by law? If he had the capacity thus to appreciate the character, and to comprehend the probable consequences of his act, he is responsible to the law for such act, and is to be judged accordingly. If he did not have such capacity, and did not thus appreciate the nature and quality of the act he was doing, he is not responsible to

79 the law for such act, and is not guilty of any crime, and not punishable therefor. If it be established by a preponderance of evidence in this case that the defendant was insane in the manner that I have just designated, and there was a general and habitual state of insanity or derangement of the intellectual faculties, then the law presumes that his mind continues in the same condition down to and including the time of the commission of the act charged against him. It is otherwise, however, when the proof shows mere temporary or spasmodic mania or insanity. This presumption of continuing insanity has no application, and does not exist as to partial or tempo-
80 rary insanity resulting from some transient cause. To illustrate this, if a person be proved to have had on a particular occasion a paroxysm of delirium, caused by fever or by a sudden and severe mental agony, there would be no presumption of law that the same state of mind continued after the exciting cause was removed. On the contrary, the presumption would be that the mind was restored to its normal condition when the disturbing cause ceased to operate.

Whenever partial insanity is relied upon as a defense to crime, it must appear that the crime charged was the product and offspring of such insanity, and not the result of some sane reasoning and natural motives, and done in
81 a spirit of hatred and revenge.

Our own Supreme Court has given as good a test, and in as appropriate language as any that can be given on this subject. It says:

"A man's mind may be unsound in many respects; indeed, he may be a monomaniac upon any given subject, and yet his mind may be sound in all other respects. Such a man, though quite capable of judging between right and wrong in regard to an act of the nature of that of which he may be accused, cannot be said to possess a sound mind, yet he would be held responsible for the commission of a criminal act, except in cases

where his peculiar unsoundness or monomania were concerned. Indeed, all men have not the same mental force or characteristics, nor is the same man at all times in the same condition as to mental powers or physical strength. His faculties may be impaired by sickness or by causes calculated to disturb or influence his passions, yet if he be in the possession of his senses, and able to judge of the particular act for which he is upon trial, and to distinguish between right and wrong in regard to it, he is morally and legally responsible for his conduct and amenable to the laws of the land."

In determining this question you are to consider the nature and character of the defendant's acts as evidenced by his acts, memory, conversations, statements, temperament, and disposition, and you are to consider all his acts and conduct at the time of, before, and subsequent to the alleged commission of the offense.

Whenever partial insanity or insane delusion or hallucination is relied upon as a defense to crime, it must appear that the crime charged was the product or offspring of such insanity, insane delusions or hallucinations, and not the result of some sane, reasoning, and natural motives.

No language that I can use will better illustrate this principle than stating two questions propounded by the House of Lords to the Judges of England and the answers thereto, arising out of the killing of Mr. Drummond by McNaughton, over forty years ago. The first question proposed was: "What is the law respecting alleged crimes committed by persons afflicted with insane delusions in respect to one or more particular subjects or persons, as for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view and under the influence of insane delusion of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit?" the answer to which was

as follows: "In answer to which, assuming," says Chief Justice Tindal, "assuming that your Lordships' inquiries are confined to those persons who labor under such partial delusion only, and are not in other respects insane, we are of the opinion that notwithstanding the party accused did the the act complained of with a view and under the influence of insane delusion of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land."

And the fourth question was as follows: "If a person under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?" To which question the answer must of course depend on the nature of the delusion, but, making the same assumption that we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same condition as to responsibility as if the facts with respect to which the delusion exists were real. For example: If under the influence of his delusion he supposes another man to be in the act of attempting to take his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune (and I will add or his person), and he killed in revenge for such supposed injury, he would be liable to punishment. And which means, substantially, "In case of partial insanity or delusion as to certain facts and matters, and the accused as to other facts and matters is sane, if the act with which he is charged was done under the influence of insane delusion, with a view of

redressing or avenging some supposed injury or of accomplishing some supposed good, he is punishable if he knew at the time of the commission of the crime that he was acting contrary to law. In cases of partial delusion, when the subject is not in other respects the same, the law considers him as to his responsibility in the same condition as if the facts in regard to which his delusion exists were real. If in his delusion he supposes another is about to take his life, he would be exempt from punishment if he kills the person as he believes in self-defense. But if the delusion was to the effect that he had suffered a serious injury from another man, and in revenge therefor, he goes and kills that man, the crime will be punished by the law, notwithstanding the perpetrator of the deed was affected with a disease of the mind."

Inasmuch as insanity necessarily involves a departure from a person's normal and natural condition, in determining this question evidence has been admitted, and properly so, as to the previous condition of the defendant, as tending to throw light upon his mental condition at the time when it is charged he committed this act of violence. And for that purpose it is your duty to consider all the evidence bearing on this question. There is an important distinction you must not lose sight of, and it is the distinction between a mental incapacity to understand the difference between right and wrong, and a moral insensibility and indifference to these distinctions. This latter condition probably results from a blunted conscience, a torpid moral sense or depravity of the heart. You must remember indifference as to what is right is not ignorance of it, and you must be careful not to mistake mere moral perversion for mental disease. You should also be careful not to confound or mistake mere passion, hatred, revenge, or simple malice, based

upon real or imaginary causes and founded upon reason and motive, with insanity. All persons, alike, are bound to control their passions of hatred, anger, and revenge. And I charge you in plain words that mere passion, temper, or anger, or a desire to avenge a real or imaginary injury, is no justification for an act of violence or the commission of a crime, however absurdly or unreasonable a person may act when angry or in passion. And, as before stated, mere anger, passion, temper, is not insanity, and is no legal excuse for a violation of the law or the commission of acts of personal violence. A person with ordinary will power, unimpaired by disease, is required by the law to govern and control his passions. If he yields to mere wicked passions, and willfully, knowingly, and purposely, and with malice aforethought, with a deadly weapon assaults another with a felonious intent, thereby of his malice aforethought to kill and murder such person, he cannot escape the penalty prescribed by the law upon a claim of mental incapacity based upon and merely arising from such causes, as I have just stated.

The law justly holds all persons responsible for their acts committed in a state of mind caused solely by wicked and ungoverned passion, resulting, not from mental disease, but simply from the giving way to a desire for revenge and to gratify a feeling of animosity and hatred. And therefore I charge you that if you believe to a moral certainty and beyond all reasonable doubt, this defendant was so far in the possession of his mental faculties as to be capable of knowing that the act he was doing was wrong, and conscious of such act, and had the power and will to do it or desist from doing it, as he chose, any partial defect of understanding which might cause him more readily to give way to passion and anger than a person ordinarily reasonable, would not constitute

94 a defense for a felonious and injurious act done by him to another in the absence of any such reasonable provocation as would arouse the resentment of a reasonable person. Nor does the law recognize a mere uncontrolled propensity and disposition, the offspring of evil passion and desire, to commit acts of violence to shield the perpetrator of such acts from punishment.

Our Supreme Court say:

"It will be seen that the English Courts have refused to recognize the coexistence of an impulse absolutely irresistible, with capacity to distinguish between right and wrong in reference to the act. It cannot be said to be irresistible because not resisted.

95 "Whatever may be the abstract truth, the law has never recognized an impulse as uncontrollable, which leaves the reasoning powers, including the capacity to appreciate the nature and quality of a particular act unaffected by mental disease. No different rule has been adopted by American Courts.

"The law is plain and clear, that if a man does an act criminal in its nature, knowing at the time of doing it that it is wrong, and having the power to do or not to do it, as he chooses, he is held responsible for it and punishable as the law provides, even though he may be urged and tempted to do it by a strong impulse, which, by the exertion of will could be controlled."

You are not warranted or justified in interfering or presuming that a person is insane merely and solely

96 from the fact that he has committed a crime, or from the enormity of a criminal act, or from the mere apparent absence of motive.

The law has adopted a certain standard by which the insanity of a party on trial may be proved where relied upon as a defense.

The burden of proving insanity rests upon the defendant, and to warrant you in acquitting him solely upon that ground, his insanity, at the time of committing the homicide, if you find he did commit it, must be established to your satisfaction by a preponderance of evidence;

97 that is, the evidence in favor of insanity must outweigh and overcome the presumption of law and the evidence in favor of sanity in some appreciable degree, and render it more probable that he was insane than that he was sane. To use the language of our own Supreme Court on this subject:

"Insanity, then, being a fact to be proved by the defense, must be established by evidence in the case with the same clearness and certainty as any other fact alleged by the defendant in his defense; that is to say, the proof must be such an amount as that if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case they would find that he was insane."

98 Under this rule, firmly established and settled in this State, you will perceive, and I so charge you, that insanity is not proved or established by simply raising a doubt whether it exists or not.

You have heard evidence in this case tending to show, and which it is claimed by the defense does show, that some of the relatives of the defendant were of unsound mind and were insane. You have also heard the testimony of the witnesses claiming to be medical experts, as to the bearing and effect such insanity of said relatives may have on the defendant by his having inherited the same. This is legitimate and pertinent evidence for you
99 to consider, and give to it such weight as you fairly believe it entitled to. Of course it is for you to determine from the evidence whether or not such insanity or unsoundness of mind existed in said relatives. The rule of law bearing upon this subject is, when there is evidence in the case tending to show insanity, insane conduct, or unsoundness of mind in the defendant, then proof of insanity in the relatives of the defendant is admissible, and proper to be weighed and considered by the jury in support of the defendant's insanity and as tending to

establish insanity in the accused. In determining this question of the sanity or insanity of the defendant you will carefully weigh all the evidence that has been produced on both sides in this case on said subject; the talk, demeanor, acts, and declarations of the defendant, so far as they have been known to you by the evidence in this case, and from the whole evidence in the case, you will come to such a conclusion upon that question as will satisfy your consciences.

Under the information in this case you may, if the evidence warrants it, find the defendant guilty of murder in the first degree, or murder in the second degree, or of manslaughter, or you may render a verdict of not guilty by reason of insanity, or a general verdict of not guilty; and it is for you to decide which one of these verdicts you shall render. Should you come to the conclusion to convict the defendant of the crime of murder under the evidence in this case, but you should entertain a reasonable doubt as to whether the offense proven against the defendant, if any offense be proven against him at all, is murder in the first degree or murder in the second degree, then your duty is to give him the benefit of that doubt, and not convict him of the higher degree. And also that rule applies should you conclude that the defendant was guilty of a felonious homicide in the killing of the deceased, but you are in doubt whether it was murder in the second degree or manslaughter. If you have any such doubt between murder in the second degree and manslaughter, your duty will be not to convict the defendant of murder in the second degree, but to convict him of manslaughter; provided, of course, that you are satisfied of his guilt thereof beyond all reasonable doubt. In other words, what I want to impress upon you is that where a criminal charge is capable of being divided into degrees as murder is, that then if you

have a reasonable doubt as to the guilt of a party as to the degrees, you should give him the benefit of the doubt and convict him only of such lower degree as to which you have no doubt of his guilt.

Now, gentlemen, in concluding this charge, it is my duty to say to you that should you find the defendant guilty of murder in the first degree, there are two verdicts, either one of which it is competent for you to render.

Our Penal Code provides that every person guilty of murder in the first degree shall suffer death, or confinement in the State prison for life, at the discretion of the jury trying the same. And if you do find the defendant guilty of murder in the first degree you have the discretion to determine the nature of his punishment, and if in your sound judgment and discretion there is any fact or circumstance in the case which ought to mitigate the extreme penalty of death, you will by your verdict indicate the same. But if you find no such mitigation in the facts of the case, and think the death penalty should be inflicted, you will simply find him guilty of murder in the first degree. By such a verdict it will be manifested that you determine and intend that he shall suffer death, for under such a verdict it will be the duty of the Court to affix the death penalty. Should you determine, however, that he shall not suffer death, but shall be punished by imprisonment in the State prison for life, this will be your form of verdict: "We, the jury, find the defendant guilty of murder in the first degree, and fix his punishment at imprisonment in the State prison for life." If you find the defendant guilty of murder in the second degree, this will be your form of verdict: "We, the jury, find the defendant guilty of murder in the second degree." If you find that the killing was unlawful, and yet without malice, as I have

defined it to you, you can under this information find the defendant guilty of manslaughter, and should you so find, this will be your form of verdict: "We, the jury, find the defendant guilty of manslaughter."

Should you, after hearing and fully considering all the evidence in this case, find and determine that the defendant killed said deceased, and that such killing was without legal cause or excuse and was not justified, and yet you find and are satisfied, by a preponderance of evidence, that at the time of such killing the defendant was insane, then your duty will be to render a verdict of not guilty by reason of insanity, and this will be your form of verdict: "We, the jury, find the defendant, John McNulty, not guilty by reason of insanity." If upon the whole evidence you have a reasonable doubt of the guilt of the defendant on any and all offenses, or degrees or grades of offenses included within the information, then you must give the benefit of such doubt to the defendant and acquit him, and in such an event your verdict will be: "We, the jury, find the defendant not guilty."

I am now about to leave this case with you, and in so doing permit me to say that I am entirely satisfied that you fully appreciate your solemn duty, and that you will perform it intelligently, without fear or favor, undue sympathy, or prejudice. And thus feeling, I conclude by saying, take the case, consider it carefully, and deal with it justly. Give the defendant all his rights and the benefit of all the testimony in his favor, and remember that your plain duty is to render a true verdict according to the evidence and the law. You will now retire to your jury-room.

Indorsed: Filed in open Court, August 6, 1888.

Wm. J. Ruddick, Clerk.
By J. J. Groom, Deputy Clerk.

109 **Sentence.**

[Title of Court and Cause.]

The judgment of the law and the sentence of the Court is, that you, John McNulty, for the murder of James Collins, on the 25th day of March, 1888, of which you have been duly convicted, be taken hence to the county jail of this city and county, and there be detained and imprisoned until such day as shall be designated and named in the warrant of execution of this judgment in due course of law, and on said day so named and designated in said warrant, it is ordered, adjudged, and decreed that you, the said John McNulty, be, by the Sheriff of the City and County of San Francisco, in the county jail thereof,
110 hanged by the neck until you are dead, and may God have mercy on your soul.

Certificate of Judgment Roll.

[Title of Court and Cause.]

CITY AND COUNTY OF SAN FRANCISCO—ss.

I, William J. Ruddick, County Clerk of the City and County of San Francisco, State of California, and ex officio Clerk of said Court, do hereby certify the foregoing to be true and correct copies of the various orders of record and on file in said Court in the above-entitled
111 cause. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said cause.

Witness my hand and the seal of said Court, this 6th day of October, A. D. 1888.

WM. J. RUDDICK, Clerk.
By BERT MCNULTY, Deputy Clerk.

Indorsed: Filed October 6, 1888.

WM. J. RUDDICK, Clerk.
By BERT MCNULTY, Deputy Clerk.

112 **Notice of Appeal.**

[Title of Court and Cause.]

To the Clerk of the above-entitled Court, and Hon. E. B. Stonehill, District Attorney and Attorney for the People:

You will please take notice that the defendant in the above-entitled action hereby appeals to the Supreme Court of this State from the final judgment of conviction in said action, and from the order denying defendant's motion for a new trial made therein and entered on the 6th day of October, 1888.

Dated this 19th day of November, 1888.

Yours, etc.,

113 WILSON & TROUTT,
Attorneys for Defendant.

Due service of the within notice of appeal is hereby admitted this 21st day of November, A. D. 1888.

E. B. STONEHILL,
District Attorney and Attorney for the People.

Indorsed: Filed November 21, 1888.

WM. J. RUDDICK, Clerk.
By J. W. EGAN, Deputy Clerk.

Clerk's Certificate.

114 [Title of Court and Cause.]

I, Wm. A. Davies, County Clerk of the city and county of San Francisco, and ex officio Clerk of the Superior Court thereof, do hereby certify the foregoing to be full, true, and correct copies of the various papers of record and on file in my office in the above-entitled cause, and that the same constitue the transcript on appeal to the Supreme Court of the State of California from the judgment made and entered in the above-entitled cause on the 6th day of October, A. D. 1888; also from the order

115 denying defendant's motion for a new trial, and from the whole thereof. And I further certify that the notice of appeal in said cause has been filed; a copy thereof is hereto annexed and made part thereof.

In witness whereof, I have hereunto set my hand and the seal of our said Court this 20th day of February, A. D. 1890.

(Seal of Superior Court. and County Clerk.) WM. A. DAVIES, Clerk.
By THOS. JASPER, Deputy Clerk.

Appellant filed points and authorities on August 26, 1890.

Respondent filed its points and authorities September
116 1, 1890.

In the Supreme Court of the State of California, Department One.

PEOPLE, ETC., *Respondent*, vs. MCNULTY, *Appellant*.

On appeal from the Superior Court of the City and County of San Francisco.

On motion of Wilson, and suggestion of a diminution of the record herein, it is ordered that the Superior Court of the City and County of San Francisco be, and the Judge of Department 12 thereof is, hereby directed to certify to the correctness of the charge given on the trial
117 of said cause, and send same forthwith to the Clerk of this Court.

To the honorable Supreme Court of the State of California, Department No. 1:

In response to the annexed order, issued from said honorable Court, and so that it may appear that there has been no dereliction on my part, I respectfully state that in said cause of *The People* vs. *McNulty* no bill of exceptions, or draft of bill of exceptions, was ever presented to me for settlement, and that no request was

made to me to sign or certify any bill of exceptions in said action.

I further state that no request was made of me to certify to the charge of the Court given in said action, until a few days ago, when I declined so to do, for the reason, among others, that nearly two years has elapsed since the appeal was taken in said action, and also for the reason that under the circumstances I doubted the propriety of complying with said request.

In obedience to the order so issued by your honorable Court, I now certify that the annexed is a full, true, and correct copy of the charge given by the Court at the trial of said action.

Respectfully,

D. J. MURPHY,

Judge of the Superior Court, City and County of San Francisco, Department 12.

In the Supreme Court of the State of California. No. 20,659. Department One.

PEOPLE, ETC., *Respondent*, vs. MCNULTY, *Appellant*.

On appeal from the Superior Court of the county of San Francisco.

On motion of Wilson, and suggestion of a diminution of the record herein, it is ordered that the Superior Court of the City and County of San Francisco be, and the Judge of Department 12 thereof is hereby directed to certify to the correctness of the charge given on the trial of said cause, and send same forthwith to the Clerk of this Court.

I, J. D. Spencer, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an order made and entered in the above-entitled cause on the 10th day of September, A. D. 1890, as shown by the records of my office.

121 Witness my hand and the seal of the Court this 10th day of September, A. D. 1890.

[SEAL.] J. D. SPENCER, Clerk.
By BEN. M. MADDOX, Deputy Clerk.

Charge to the Jury.

[Title of Court and Cause.]

Gentlemen of the Jury:

You will please give me your earnest and careful attention while I give you in charge and explain to you such principles of law as are applicable to the case now about to be submitted to you. And in passing, permit me to
122 say to you that I have no doubt, from the careful attention that you have given the case up to the present moment, that you will continue to give it the same thoughtful and careful consideration till you determine the question to be settled by your verdict.

I desire to say to you that in the charge I am now giving, you will please understand that the Court in no manner or form intends or wishes you to understand that the Court is expressing any opinion on the weight of evidence or the truth or falsity of any witness' statement, or that any fact in the case is or is not proven. The Court has nothing to do with the question of fact, the
123 weight that should be given to the testimony, and the credit that you shall give to any and all the witnesses in the case. These are matters peculiarly within your province, and which you, as jurors, under your oath must determine for yourselves.

The defendant at the bar, John McNulty, is accused by the District Attorney of this city and county, by an information filed in this Court, in and by which he is charged with the crime of murder, alleged to have been committed in this city and county on the 25th day of March,

124 1888, in the manner following, that is: that he, the said John McNulty, did then and there willfully, unlawfully, feloniously, and of his malice aforethought, kill and murder one James Collins.

To this information thus presented, the defendant has interposed his plea of not guilty, which puts in issue every material allegation of the information, and it devolves upon the prosecution to establish to your satisfaction, and beyond all reasonable doubt, that the defendant is guilty as charged, or of some other offense or degree of crime included within the charge, as will be hereafter more particularly explained to you.

125 In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused.

All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity. On this question of intent, gentlemen, as I have said before, you must arrive at it from all the circumstances surrounding the commission of the alleged act, which is charged to be criminal, and from all the evidence in the case. Of course you all understand that we cannot look into the mind of a man and see what its workings are; we cannot

126 bring a photograph of the mind of a man and exhibit it to you so as to determine clearly and absolutely what the workings of human beings' minds are. Hence, from necessity, the law says that you shall gather the intention with which the act is done from all the circumstances surrounding its commission, and from all the evidence appearing in the case before you.

The word "willful," when applied to the intent with which an act is done or omitted, implies simply a pur-

127 pose or willingness to commit the act or to make the omission referred to.

The words "malice" and "malicious" impart a wish to vex, annoy, or injure another, and, as our Supreme Court say: "While, in its popular sense, it may denote mere hatred and ill-will, yet, in its legal sense, malice means an act done intentionally and unlawfully, and with the intent to injure another, without legal justification or excuse, and is proved either by proof or presumption of law."

You are not bound to decide in conformity with the declaration of any number of witnesses which does not
128 produce conviction in your minds against a less number of witnesses, or against a presumption of law, satisfying your minds. A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole or any part of the testimony of any witness who has willfully sworn falsely as to a material point or fact in the case; and if you believe that any witness in this case has willfully sworn falsely to any material matter or fact in the case, with a design to deceive you, you must treat all his testimony with distrust and suspicion, and may reject all or any part of the same.

A malicious and guilty intent is conclusively presumed
129 from the deliberate commission of an unlawful act for the purpose of injuring another.

All the presumptions of law, independent of evidence, are in favor of innocence, and every person accused of crime is presumed to be innocent till his guilt is established to your satisfaction and beyond all reasonable doubt

Every material fact necessary to establish the guilt of the defendant of the offense charged, or any degree of crime included within the charge and information, must

130 be established by the prosecution beyond all reasonable doubt.

By this term, reasonable doubt, is not meant every possible or fanciful doubt or conjecture that may suggest itself or be suggested to your minds.

It is not a mere guess or a surmise, because everything relating to human affairs and dependent upon moral evidence is open to some fanciful doubt or conjecture. But a reasonable doubt is a fair doubt, based upon reason and growing out of the testimony in the case. In the words of our Supreme Court, a reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves your minds in
131 that condition that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge.

Now, while the prosecution is obliged to establish the guilt of the defendant beyond all reasonable doubt, you will not understand that it must establish such guilt to an absolute certainty, or to a demonstration, because such degree of proof is rarely if ever attainable in a Court of justice.

A defendant in a criminal case may establish any fact necessary for him to establish in his defense by a preponderance of evidence; that is to say, that the evidence in favor of the fact sought to be established by the de-
132 fense is in some degree greater in its favor than the evidence which is against it. A defendant is never obliged to establish any fact in his defense to a moral certainty and beyond all reasonable doubt.

Evidence has been introduced here on behalf of the defendant as to his previous character for peace and quietness; and, inasmuch as the law at the outset clothes the defendant in a criminal case with the presumption of innocence, when the proof on the part of the prosecution tends to overthrow this presumption, and fix upon the

133 defendant the commission of a crime, he is then permitted to support the original presumption of innocence by proof of good character for peace and quietness, being the traits involved in this charge. The good character and reputation of a defendant upon trial, for peace and quietness, in a charge of this kind, is itself a fact in the case. It is a circumstance tending in a greater or less degree to show his innocence; and, therefore, in this case the good character of the defendant, if proved to your satisfaction, is to be considered by you in connection with all the other facts and circumstances of this case in determining the question of the guilt or innocence of the defendant.

134 It should be weighed, if proved, as any other fact in the case, and it may be sufficient of itself to create a reasonable doubt as to his guilt, when no such doubt might exist were it not for the evidence of previous good character; but, notwithstanding a person may prove a previous good character for the traits involved in the charge, yet if you are satisfied of his guilt of the offense charged, or any degree of crime included within the offense, it is your duty to convict of such crime as you may be so satisfied of his guilt of, notwithstanding such evidence of previous good character.

135 You are the sole judges of the credibility of the witnesses, and each of them, and of the testimony in the case. You will weigh carefully the testimony of each and all the witnesses in the case, and give to the same just such credit as you conscientiously believe it entitled to; and in considering what weight you will give to the testimony of any and all the witnesses in the case, you will consider the character and appearance of the witness upon the stand; the consistency and reasonableness of their statements; their apparent intent and desire to tell the truth; their feelings, motives, and conduct, so far as made known to you during the trial of this case.

136 Among the witnesses who have taken the stand here is this defendant. This is his legal right, and you are not to disregard or discredit his testimony simply and solely because he is the defendant and accused of crime. But you are to judge of his testimony fairly, and apply the same tests as far as they are applicable to his testimony that you apply to all the witnesses in the case.

It is proper for you to bear in mind, in weighing the credit and value that you will give to his testimony, the relation that he bears to the case, and the situation that he finds himself in; the manner in which he testifies and the manner in which he may be affected by the ver-
137 dict. These, and such other proper tests as may suggest themselves to you, you should apply in weighing his testimony, and also with all the other witnesses in the case.

Now, gentlemen, as I have stated to you, the information in this case charges the defendant, John McNulty, with the crime of murder, and within this information are included the following crimes, or degrees of crime, any one of which you may convict the defendant of, if you are satisfied of his guilt thereof to a moral certainty and beyond such reasonable doubt as I have explained to you. Then the first and greatest offense charged here is murder of the first degree. The second offense or
138 degree of crime charged and included in this information is murder of the second degree; and the third degree of crime charged and included in this information is that of manslaughter. Murder is defined by our Penal Code to be the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifest a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an

139 abandoned and malignant heart. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree, and all other kinds of murder are of the second degree. There is no presumption of law that a homicide is murder in either degree; but, whether it is either murder or manslaughter, depends upon the facts and circumstances under which the act of homicide was committed.

Under the information in this case, the defendant
140 may, if in your judgment the facts warrant it, be convicted of manslaughter.

This is defined by our Penal Code to be the unlawful killing of a human being without malice. It is of two kinds: (1) voluntary, upon a sudden quarrel or heat of passion; (2) involuntary, in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection.

To reduce a felonious homicide from the grade of murder to that of manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of such a character as would be naturally calculated to
141 excite and arouse the passions; and it must appear, also, that the party acted under the smart of this sudden passion and resentment.

In such a case the law, commiserating the frailty of human nature, withdraws the offense from the higher class in which malice and deliberation characterize the act, and tempers its judgment accordingly. If, however, the provocation was of a slight or trifling character, of such a nature as would not be calculated to arouse passion, or if sufficient time had elapsed between the provo-

142 cation given and the fatal blow struck, or the fatal shot fired, for passion to subside and reason to resume its empire, the offense will not be mitigated, but the slayer will be guilty of murder.

A person must be supposed to mean to do that which he actually and intentionally and willfully does in fact do, and must also be presumed to intend all the probable and natural and usual consequences of his voluntary act. Therefore when one person assails another with a deadly weapon, a weapon likely and calculated to, and which does in fact destroy the life of the party assailed, the natural and legal presumption is that such assailant
143 intended serious injury upon the person of the party assailed, and in the absence of evidence to the contrary overcoming the same this legal presumption must prevail. The willful and unlawful use of a deadly weapon without just cause or legal excuse or provocation, in such a manner as to imperil human life, generally indicates a felonious intent; and the law, therefore, presumes that every one who deliberately and intentionally fires a pistol at another, and within a few feet of him, intending to kill him, does such act willfully, and would imply malice, and should such person thus fired at die from the effects of such shot, it would be murder, unless the evidence on the part of the prosecution tends to show that the crime
144 committed amounted only to manslaughter, or the evidence in the case showed that the accused was legally justified or excusable in the commission of such homicide.

In this case, gentlemen, it is not claimed by the prosecution that the homicide was committed in the perpetration, or attempt to perpetrate, any other felony, but it is claimed that it is murder in the first degree, as being unlawful, malicious, willful, deliberate, and premeditated.

In this class of cases the Legislature leaves the jury to determine, from all the evidence before them, the degree

of the crime; but it prescribes for the government of their deliberations the same test, which is: Is the killing willful, deliberate, and premeditated? The unlawful killing must be accompanied with a deliberate and clear intent to take life, in order to constitute the crime of murder in the first degree. The attempt to kill must be the result of deliberate premeditation. It must be formed upon a preëxisting reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable space of time between the intent to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind.

It is only necessary that the act of killing be preceded by a concurrence of the will, deliberation, and premeditation on the part of the slayer, and, if such is the case, the killing is murder in the first degree, no matter how rapidly these actions of the mind may succeed each other, or how quickly they may be followed by the act of killing. From this definition, you will see that any unlawful killing of a human being, with malice aforethought, is murder; but if nothing further characterizes the offense, it is murder in the second degree. To constitute the higher offense of murder in the first degree, there must be superadded to the general definition above given, willfulness, deliberation, and premeditation. By willfulness is meant that it is of purpose with the intent, that by the given act the life of the party should be taken. It must be deliberate and premeditated, as I before stated, to constitute murder of the first degree. By this is not meant that the killing must be conceived or intended for any particular length of time. It is sufficient if it was done with reflection and conceived beforehand. And in this view, as I have stated before, the deliberate purpose to kill and the killing may follow each other as

148 rapidly as successive thoughts of the mind. "A man," says our Supreme Court, "may do a thing willfully, deliberately, and intentionally from a moment's reflection, as well as after pondering over the subject for a month or a year. He can premeditate, that is, think, before doing an act the moment he conceived the purpose, as well as if the act was the result of long preconcert and preparation. There is nothing in the section of the Penal Code relating to this subject which indicates that the Legislature meant to assign any particular period to this process of premeditation or deliberation, in order to bring the act within the first degree."

149 It is enough that the party deliberate before the act, premeditate the purpose to slay before he fired the fatal shot. But, while the fatal purpose or intent and its execution may follow thus rapidly upon each other, it is proper for you to take into consideration the shortness of such interval, if such be the fact, in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger rather than to deliberation and premeditation, which must characterize the higher offense. You will see from what I have stated that the distinction between the two grades of murder is that in murder of the first degree, unless it was committed in the perpetration or attempt to perpetrate one of the felonies

150 mentioned, the killing must be deliberate and premeditated, whilst in murder in the second degree the killing is not deliberate or premeditated.

In the one case there is a deliberate premeditation, a preconceived design, though it may have been formed in the mind immediately before the mortal wound was given to take life; in the other there is no deliberation, premeditation, or preconceived design to kill. In order to constitute murder in either degree, the killing must have been unlawful and accompanied with malice.

151 In this case, if you find from the evidence that the defendant fired the fatal shot which caused the death of the deceased, at the time and place mentioned in the information, then the burden of proving circumstances in mitigation, or that justify or excuse the homicide, devolves upon the defendant, unless the proof upon the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable in his act.

Now, gentlemen, in this case it is claimed by and on behalf of the defendant that on the 25th day of March, 1888, on which it is alleged by the prosecution that he
152 took the life of the deceased, that the accused was insane, and by reason thereof if he did take the life of the deceased he is not responsible or punishable therefor by reason of such insanity, and should be acquitted. It is my duty to say to you that against such a defense the law entertains no prejudice; on the contrary, if it be established, by a preponderance of evidence, the law accords to the accused the full benefit of it, and your duty will be to acquit him of all criminal responsibility, by reason of his insanity.

It may be true that this defense is sometimes resorted to in cases in which the proof of the overt act is so full and complete that any other means of avoiding convic-
153 tion and escaping punishment seems hopeless.

It may have been abused and used in cases of unquestionable guilt, and may have been the excuse for juries acquitting when their own and the public sympathy has been with the accused party, and justified and excused according to popular sentiment, but not according to law. While, therefore, all this may be true, yet it is a defense to be weighed fairly, fully, and justly, and when proved in the manner I shall state and explain to you, must recommend itself to the sense of humanity and to the justice

of the jury. You are to examine it with care and caution, however, lest an ingenious counterfeit of this mental infirmity should furnish immunity from, and perhaps defeat proper and just punishment.

In considering and protecting the unfortunate insane class, which appeals so loudly to our sympathies, great care should be taken that we do not break down all legal barriers to crime and leave society to the mercy of those whose evidence of insanity may consist only in their own depravity. This defense should be carefully scanned, not with a foregone conclusion to disallow it as a pretense, nor with undue bias in its favor, but with a firm determination, without partiality or prejudice, to give the testimony submitted on this subject its due weight; nothing more or nothing less.

Our Penal Code provides that all persons are capable of committing crime, except those belonging to certain specified classes, among which are idiots, lunatics, and insane persons, and further provides that all persons are of sound mind who are neither idiots, lunatics, nor affected with insanity. It is undoubtedly the law that when, by reason of disease, the mind has become so affected as to render a person unconscious of the act he is doing and which is charged as criminal against him, or that he does not know the act he is doing is wrong, and is not capable of distinguishing between right and wrong as to such act, then such a person is not accountable for such act and not punishable for its commission. And the main and true test binding upon the Court and upon you, the jury, is, was the accused at the time of doing the act complained of conscious of the act he was doing? Did he know at the time it was wrong to do it? Had he at the time the power of distinguishing good from evil, right from wrong, as to the act he was doing? Had he mental capacity to appreciate the nature and

quality of the act he was doing, or to know that it was a violation of the rights of another, in itself wrong and prohibited by law? If he had the capacity thus to appreciate the character, and to comprehend the probable consequences of his act, he is responsible to the law for such act, and is to be judged accordingly. If he did not have such capacity and did not thus appreciate the nature and quality of the act he was doing, he is not responsible to the law for such act, and is not guilty of any crime and not punishable therefor.

If it be established by a preponderance of evidence in this case that the defendant was insane in the manner that I have just designated, and there was a general and habitual state of insanity or derangement of the intellectual faculties, then the law presumes that his mind continues in the same condition down to and including the time of the commission of the act charged against him. It is otherwise, however, when the proof shows mere temporary or spasmodic mania or insanity.

This presumption of continuing insanity has no application, and does not exist as to partial or temporary insanity resulting from some transient cause.

To illustrate this: if a person be proved to have had on a particular occasion a paroxysm of delirium, caused by fever or by a sudden and severe mental agony, there would be no presumption of law that the same state of mind continued after the existing cause was removed. On the contrary, the presumption would be that the mind was restored to its normal condition when the disturbing cause ceased to operate.

Whenever partial insanity is relied upon as a defense to crime, it must appear that the crime charged was the product and offspring of such insanity, and not the result of some sane reasoning and natural motives, and done in a spirit of hatred and revenge.

160 Our own Supreme Court has given as good a test, and in as appropriate language as any that can be given on this subject. It says:

"A man's mind may be unsound in many respects; indeed, he may be a monomaniac upon any given subject, and yet his mind may be sound in all other respects. Such a man, though quite capable of judging between right and wrong in regard to an act of the nature of that of which he may be accused, cannot be said to possess a sound mind, yet he would be held responsible for the commission of a criminal act, except in cases where his peculiar unsoundness or monomania were concerned. Indeed, all men have not the same mental force or characteristics, nor is the same man at all times in the same condition as to mental powers or physical strength. His
161 faculties may be impaired by sickness, or by causes calculated to disturb or influence his passions; yet if he be in the possession of his senses, and able to judge of the particular act for which he is upon trial, and to distinguish between right and wrong in regard to it, he is morally and legally responsible for his conduct and amenable to the laws of the land."

In determining this question, you are to consider the nature and character of the defendant's acts as evidenced by his acts, memory, conversations, statements, temperament, and disposition, and you are to consider all his acts and conduct at the time of, before, and subsequent to the alleged commission of the offense.

162 Whenever partial insanity, or insane delusion, or hallucination, is relied upon as a defense to crime, it must appear that the crime charged was the product or offspring of such insanity, insane delusions, or hallucinations, and not the result of some sane reasoning and natural motives. No language that I can use will better illustrate this principle than stating two questions, propounded by the House of Lords to the Judges of England, and the answers thereto, arising out of the killing of Mr. Drummond by McNaughton, over forty years ago. The first question proposed was: "What is the law

163 respecting alleged crimes committed by persons afflicted with insane delusions in respect to one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view and under the influence of insane delusion of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit?" The answer to which was as follows:

"In answer to which, assuming," says Chief Justice Tindal, "assuming that your Lordships' inquiries are confined to those persons who labor under such partial delusion only, and are not in other respects insane, we
164 are of the opinion that notwithstanding the party accused did the act complained of with a view and under the influence of insane delusion of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land."

And the fourth question was as follows:

"If a person under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?" To which question the answer must, of course, depend upon the nature of the delusion, but
165 making the same assumption that we did before, namely: that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same condition as to responsibility as if the facts with respect to which the delusion exists were real. For example: if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune (and I will add or his person), and he killed in revenge for such supposed injury, he would be liable to punishment. And which means substantially: "In cases of partial insanity or delusion

as to certain facts and matters, and the accused as to other facts and matters is sane, if the act with which he is charged was done under the influence of insane delusion, with a view of redressing or avenging some supposed injury, or of accomplishing some supposed good, he is punishable if he knew at the time of the commission of the crime that he was acting contrary to law. In cases of partial delusion, when the subject is not in other respects the same, the law considers him as to his responsibility in the same condition as if the facts in regard to which his delusion exists were real. If in his delusion he supposes another is about to take his life, he would be exempt from punishment if he kills the person in, as he believes, self-defense. But if the delusion was to the effect that he had suffered a serious injury from another man, and in revenge therefor he goes and kills that man, the crime will be punished by the law, notwithstanding the perpetrator of the deed was affected with a disease of the mind."

Inasmuch as insanity necessarily involves a departure from a person's normal and natural condition in determining this question, evidence has been admitted, and properly so, as to the previous condition of the defendant, as tending to throw light upon his mental condition at the time when it is charged he committed this act of violence; and for that purpose it is your duty to consider all the evidence bearing on this question. There is an important distinction you must not lose sight of, and it is the distinction between a mental incapacity to understand the difference between right and wrong, and a moral insensibility and indifference to these distinctions. This latter condition probably results from a blunted conscience, a torpid moral sense, or depravity of heart. You must remember indifference as to what is right is not ignorance of it, and you must be careful not to mistake mere moral perversion for mental disease. You should also be careful not to confound or mistake mere passion, hatred, revenge, or simple malice, based upon real or imaginary causes and founded upon reason

and motive, with insanity. All persons, alike, are bound to control their passions of hatred, anger, and revenge.

And I charge you in plain words that mere passion, temper, or anger, or a desire to avenge a real or imaginary injury, is no justification for an act of violence or the commission of a crime, however absurdly or unreasonable a person may act when angry or in passion. And, as before stated, mere anger, passion, or temper is not insanity, and is no legal excuse for a violation of the law or the commission of acts of personal violence. A person with ordinary will power, unimpaired by disease, is required by the law to govern and control his passions. If he yields to mere wicked passions and willfully, knowingly, and purposely, and with malice aforethought, with a deadly weapon assaults another with a felonious intent, thereby of his malice aforethought to kill and murder such person, he cannot escape the penalty prescribed by the law upon the claim of mental incapacity based upon and merely arising from such causes, as I have just stated.

The law justly holds all persons responsible for their acts committed in a state of mind caused solely by wicked and ungoverned passion, resulting, not from mental disease, but simply from the giving way to a desire for revenge, and to gratify a feeling of animosity and hatred. And therefore I charge you that if you believe to a moral certainty and beyond all reasonable doubt, this defendant was so far in the possession of his mental faculties as to be capable of knowing that the act he was doing was wrong, and conscious of such act, and had the power and will to do it or desist from doing it, as he chose, any partial defect of understanding which might cause him more readily to give way to passion and anger than a person ordinarily responsible, would not constitute a defense for a felonious and injurious act done

172 by him to another in the absence of any such reasonable provocation as would arouse the resentment of a reasonable person. Nor does the law recognize a mere uncontrolled propensity and disposition, the offspring of evil passion and desire, to commit acts of violence, to shield the perpetrator of such acts from punishment.

Our Supreme Court say:

"It will be seen that the English Courts have refused to recognize the coexistence of an impulse absolutely irresistible, with capacity to distinguish between right and wrong in reference to the act. It cannot be said to be irresistible because not resisted.

"Whatever may be the abstract truth, the law has
173 never recognized an impulse as uncontrollable, which leaves the reasoning powers, including the capacity to appreciate the nature and quality of a particular act, unaffected by mental disease. No different rule has been adopted by American Courts.

"The law is plain and clear, that if a man does an act criminal in its nature, knowing at the time of doing it that it is wrong, and having the power to do or not to do it, as he chooses, he is held responsible for it and punishable as the law provides, even though he may be urged and tempted to do it by a strong impulse, which, by the exertion of will, could be controlled."

You are not warranted or justified in inferring or presuming that a person is insane merely and solely from the fact that he has committed a crime, or from the enor-
174 mity of a criminal act, or from the mere apparent absence of motive.

The law has adopted a certain standard by which the insanity of a party on trial may be proved where relied upon as a defense.

The burden of proving insanity rests upon the defendant, and to warrant you in acquitting him solely upon that ground, his insanity at the time of committing the homicide, if you find he did commit it, must be established to your satisfaction by a preponderance of evi-

175 dence; that is, the evidence in favor of insanity must outweigh and overcome the presumption of law and the evidence in favor of sanity in some appreciable degree, and render it more probable that he was insane than that he was sane. To use the language of our own Supreme Court on this subject:

"Insanity, then, being a fact to be proved by the defense, must be established by evidence in the case with the same clearness and certainty as any other fact alleged by the defendant in his defense; that is to say, the proof must be such an amount that if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case, they would find that he was insane."

176 Under this rule, firmly established and settled in this State, you will perceive, and I so charge you, that insanity is not proved or established by simply raising a doubt whether it exists or not.

You have heard evidence in this case tending to show, and which it is claimed by the defense does show, that some of the relatives of the defendant were of unsound mind, and were insane. You have also heard the testimony of the witnesses claiming to be medical experts as to the bearing and effect such insanity of said relatives may have on the defendant by his having inherited the same. This is legitimate and pertinent evidence for you

177 to consider, and give to it such weight as you fairly believe it entitled to. Of course it is for you to determine from the evidence whether or not such insanity, or unsoundness of mind, existed in said relatives. The rule of law bearing upon this subject is when there is evidence in the case tending to show insanity, insane conduct, or unsoundness of mind in the defendant, then proof of insanity in the relatives of the defendant is admissible, and proper to be weighed and considered by the jury in support of the defendant's insanity, and as tending to establish insanity in the accused.

178 In determining the question of the sanity or insanity of the defendant you will carefully weigh all the evidence that has been produced on both sides of this case on said subject; the talk, demeanor, acts, and declarations of the defendant, so far as they have been known to you by the evidence in this case, and from the whole evidence in the case you will come to such a conclusion upon that question as will satisfy your consciences.

Under the information in this case you may, if the evidence warrants it, find the defendant guilty of murder in the first degree, or murder in the second degree, or of manslaughter, or you may render a verdict of not guilty
179 by reason of insanity, or a general verdict of not guilty; and it is for you to decide which one of these verdicts you shall render. Should you come to the conclusion to convict the defendant of the crime of murder, under the evidence in this case, but you should entertain a reasonable doubt as to whether the offense proven against the defendant, if any offense be proven against him at all, is murder in the first degree, or murder in the second degree, then your duty is to give him the benefit of that doubt and not convict him of the higher degree. And also that rule applies, should you conclude that the defendant was guilty of a felonious homicide in the killing of the deceased, but you are in doubt whether it was murder in
180 the second degree or manslaughter. If you have any such doubt between murder in the second degree and manslaughter, your duty will be not to convict the defendant of murder in the second degree, but to convict him of manslaughter; provided, of course, that you are satisfied of his guilt thereof beyond all reasonable doubt. In other words, what I want to impress upon you is that where a criminal charge is capable of being divided into degrees as murder is, that then if you have a reasonable doubt as to the guilt of a party as to the degrees, you

181 should give him the benefit of the doubt and convict him only of such lower degree as to which you have no doubt of his guilt.

Now, gentlemen, in concluding this charge, it is my duty to say to you that should you find the defendant guilty of murder in the first degree there are two verdicts, either one of which is competent for you to render.

Our Penal Code provides that every person guilty of murder in the first degree shall suffer death, or confinement in the State prison for life, at the discretion of the jury trying the same. And if you do find the defendant guilty of murder in the first degree you have the discre-
182 tion to determine the nature of his punishment, and if in your sound judgment and discretion there is any fact or circumstance in the case which ought to mitigate the extreme penalty of death, you will by your verdict indicate the same. But if you find no such mitigation in the facts of the case, and think the death penalty should be inflicted, you will simply find him guilty of murder in the first degree.

By such a verdict it will be manifested that you determine and intend that he shall suffer death, for under such a verdict it will be the duty of the Court to affix the death penalty.

Should you determine, however, that he shall not suffer
183 death, but shall be punished by imprisonment in the State prison for life, this will be your form of verdict: "We, the jury, find the defendant guilty of murder in the first degree, and fix his punishment at imprisonment in the State prison for life."

If you find the defendant guilty of murder in the second degree, this will be your form of verdict: "We, the jury, find the defendant guilty of murder in the second degree."

If you find that the killing was unlawful, and yet

184 without malice, as I have defined it to you, you can under this information find the defendant guilty of manslaughter, and should you so find this will be your form of verdict: "We, the jury, find the defendant guilty of manslaughter."

Should you, after hearing and fully considering all the evidence in this case, find and determine that the defendant killed said deceased, and that such killing was without legal cause or excuse, and was not justified, and yet you find and are satisfied, by preponderance of evidence, that at the time of such killing the defendant was insane, then your duty will be to render a verdict of not guilty
185 by reason of insanity, and this will be your form of verdict: "We, the jury, find the defendant, John McNulty, not guilty by reason of insanity."

If upon the whole evidence you have a reasonable doubt of the guilt of the defendant of any and all offenses, or degrees or grades of offense included within the information, then you must give the benefit of such doubt to the defendant and acquit him, and in such an event your verdict will be: "We, the jury, find the defendant not guilty."

I am now about to leave this case with you, and in so doing permit me to say that I am entirely satisfied that you fully appreciate your solemn duty, and that you will
186 perform it intelligently, without fear or favor, undue sympathy, or prejudice. And thus feeling, I conclude by saying, take the case, consider it carefully and deal with it justly. Give the defendant all his rights and the benefit of all the testimony in his favor, and remember that your plain duty is to render a true verdict according to the evidence and the law. You will now retire to your jury-room.

Indorsed: Filed September 3, 1890.

J. D. SPENCER, Clerk.
By BEN M. MADDOX, Deputy.

187 November 11, 1890. On motion of the Attorney-General and suggestion of a diminution of the record it is ordered that he be permitted to file a certified copy of minute record of judgment.

November 11, 1890. Filed certified copy of minute order of judgment as follows:

In the Superior Court, City and County of San Francisco, State of California.

SATURDAY, October 4, A. D. 1890.

Present: Hon. D. J. Murphy, Judge.

188 THE PEOPLE OF THE STATE OF CALIFORNIA VS. JOHN MCNULTY.

Convicted of murder in the first degree.

Upon motion of the District Attorney, and on presenting and filing the affidavit of J. J. Groom, and it appearing to the Court that the minutes of the judgment of this Court in the above-entitled action, are incomplete and defective, and does not fully show all the proceedings that actually took place in this Court at the time of pronouncing said judgment, in the following particular, to wit:

It does not appear therein that said defendant, at the
189 time of said judgment, was asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had not; whereas, in truth and in fact, said defendant was asked at the time of the rendition and making of said judgment, to wit, on October 6, 1888, if he had any legal cause to show why judgment should not be pronounced against him, to which he replied he had not.

It is therefore ordered by the Court that the minutes of the judgment made and rendered in the above-entitled

190 action, to wit, on the 6th day of October, 1888, be amended *nunc pro tunc*, as of said date, in the following particulars, to wit: After the words "Guilty of murder in the first degree," in said minutes of said judgment, shall be inserted the words, "And being asked if he had any legal cause to show why judgment should not be pronounced against him, he replied that he had not."

And the minutes of the judgment made and entered in said action, including the amendment hereinbefore made and set forth, is in the following language, to wit:

SATURDAY, October 6, A. D. 1888.

Court met. Present: Hon. D. J. Murphy, Judge.

191 PEOPLE OF THE STATE OF CALIFORNIA VS. JOHN MCNULTY.

Convicted of murder in the first degree.

Defendant and counsel present.

Defendant's motion for a new trial denied, and defendant excepts.

Whereupon the defendant, John McNulty, was duly informed by the Court, in the presence of his counsel, in open Court, of the information duly presented and filed against him, by which he was accused of the crime of murder, in willfully, feloniously, and of his malice aforethought, killing and murdering one James Collins; of his arraignment, and plea of not guilty; of his trial, and the

192 verdict of the jury of "guilty of murder in the first degree." "*And being asked if he had any legal cause to show why judgment should not be pronounced against him, he replied that he had not.*"

And it appearing to the Court that no sufficient cause has been *shown* why the judgment of the law and the sentence of the Court should not be pronounced against said defendant, John McNulty, the following judgment is pronounced and rendered by the Court:

The judgment of the law and the sentence of the Court

193 is that you, John McNulty, for the murder of James Collins, on the 20th day of March, A. D. 1888, of which you have been duly convicted, be taken hence to the county jail of this city and county, and there be detained and imprisoned until said day as shall be designated and named in the warrant of execution of this judgment, in due course of law; and on said day so named in the said warrant, it is ordered, adjudged, and decreed that you, the said John McNulty, be, by the Sheriff of the City and County of San Francisco, in the county jail thereof, hanged by the neck until you are dead, and may God have mercy on your soul.

194 Office of the Clerk of the Superior Court of the City and County of San Francisco, State of California.

I, William A. Davis, County Clerk of the City and County of San Francisco, and ex officio Clerk of the Superior Court thereof, do hereby certify the foregoing to be a full, true, and correct copy of the minutes of the judgment duly made and entered herein, October 6, 1888, amended *nunc pro tunc*, as October 6, 1888, on October 4, 1890, in the case of *The People of the State of California* vs. *John McNulty*, defendant.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 4th day of October, A. D. 1890.

195 [SEAL.] WM. A. DAVIS, Clerk.
By BERT MCNULTY, Deputy Clerk.

Indorsed: Filed November 11, 1890.

J. D. SPENCER, Clerk.
By J. J. PAULSELL, Deputy.

January 8, 1891. Cause submitted.

Appeal from Superior Court, San Francisco. D. J. Murphy, Judge.

For appellant, Wilson & Troutt.

For respondent, Attorney-General W. H. H. Hart.

196 *Department One.*

PEOPLE, *Respondent*, vs. MCNULTY, *Appellant*.

No. 20,659.

The defendant, McNulty, was charged, by information, with the murder of "one James Collins." He was convicted as charged, and prosecutes this appeal from the judgment rendered against him, and from an order denying a new trial.

"The defense set up at the trial was insanity. The bill of exceptions is the charge of the Court."

The grounds of error alleged are that the Court in its instructions charged the jury that the defendant must
197 establish the fact of insanity, after proof of the alleged killing, by a preponderance of evidence; his contention in brief being that sanity is a necessary ingredient in the guilt of one charged with murder. That such guilt must be proved beyond any reasonable doubt, and hence if the evidence discloses a reasonable doubt as to whether a defendant is sane, he must be acquitted.

The question, which is exhaustively presented, and the authorities fully stated and discussed, has recently been settled by an opinion of the appellate Court of this State in *People* vs. *Travers*, 26 Pac. Rep. 88, which as to the matter in hand reads thus:

198 "3. In the instructions given upon the subject of insanity, there was no error prejudicial to appellant. They are somewhat voluminous; but the main proposition contained in them was that a person is presumed to be sane until the contrary is shown, and that the burden is on a defendant of showing insanity by a preponderance of evidence. This rule has been established in this State by a long line of authorities. (*People* vs. *Meyers*, 20 Cal. 518; *People* vs. *Coffman*, 24 Cal. 237; *People* vs. *McDonell*, 47 Cal. 134; *People* vs. *Wilson*, 49 Cal. 13; *People* vs. *Messersmith*, 61 Cal. 246; *People* vs. *Hamilton*, 62 Cal. 377; *People* vs. *Kernaghan*, 72 Cal. 609, 14 Pac. Rep. 566; *People* vs. *Eubanks*, 86 Cal. 295.) And this long line of decisions cannot be held to have been overruled

by *People* vs. *Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549, where the defense was accident; and *People* vs. *Elliott*, 80 Cal. 296, 22 Pac. Rep. 207, where the defense was self-defense. In those cases the Court was dealing entirely with those 'circumstances' referred to in Section 1105 of the Penal Code, which mitigate, or justify, or excuse an act done by a sane man who might commit a crime, and its attention was not called in any way to that unusual and peculiar mental condition called 'insanity,' which renders a man utterly incapable of committing crime at all. In the opinion of the Court in *People* vs. *Bushton*, reference is made to *People* vs. *Smith*, 59 Cal. 607, and *People* vs. *Flanagan*, 60 Cal. 3, in which the very doctrine of the Bushton case was stated; but in those cases—where the defenses were self-defense and defense of property—the Court certainly did not intend to overthrow the settled rule of the Court on the subject of insanity. We are clear, therefore, that the undisturbed law of this State still is that the burden of showing insanity is upon a defendant who seeks shelter under it as a defense. (Page 90, Vol. 26, Pac. Rep. No. 1.)"

This disposes of all the points made by counsel for the defendant.

An attorney, permitted to file a brief as *amicus curiæ*, has raised certain points as to the minutes of the Court not showing that certain things were done, which are required by law, and that the judgment was insufficient, as not showing that the defendant had been convicted of murder in the first degree, although it does state that the sentence was "for the murder of James Collins, on the 25th day of March, 1888, of which you have been duly convicted."

The judgment was sufficient as stating the general offense "murder," of which the defendant was convicted. (*People* vs. *Murphy*, 43 Cal. 455; *Ex parte Simpson*, 47 Cal. 127.)

It appears that, upon a suggestion of the diminution of the record, there was filed here a certified copy of the minutes of the trial Court, containing, among other things, an amendment of the minutes *nunc pro tunc*, as to the fact

202 that when the defendant appeared for judgment he was asked "if he had any legal cause to show why judgment should not be pronounced against him." This amendment could be made by the trial Court so as to conform to the true state of facts, even pending appeal. (*People* vs. *Murback*, 64 Cal. 372.)

As to all other matters which it is complained were not done, even if it be conceded without deciding, that as the record originally appeared it *affirmatively showed* that they were *not* done, the certified copy of the minutes of the proceedings show that none of the points made as to the sufficiency of the minutes are well taken, that
203 everything was done which the statute required to save all the rights of the defendant when called up for sentence and judgment.

He also urges an objection to the sufficiency of the information in respect that it does not designate a human being as having been murdered by defendant in the allegation that the defendant "did then and there willfully, unlawfully, feloniously, and of his malice aforethought, kill and murder one John Collins." The argument being that one *John Collins* might mean a horse as well as a person or human being.

It is manifest that the defendant could not have been otherwise than informed by the language used, that he
204 was accused of the murder of a human being, when he was charged with having murdered "one John Collins." This is all that the law requires. (Sub. 6, Sec. 959, Penal Code; *People* vs. *Freeland*, 6 Cal. 98.)

We therefore advise that the judgment and order be affirmed.

FOOTE, C.

We concur:

VAN CLIEF, C.

BELCHER, C.

205 The Court: For the reasons given in the foregoing opinion the judgment and order are affirmed.

Indorsed: Filed May 1, 1891.

L. H. BROWN, Clerk.
By G. E. MADISON, Deputy.

May 27, 1891. The judgment of affirmance heretofore rendered and entered herein is by the Court vacated and set aside, and the submission of said cause is set aside, in order that the same may be argued upon the question of effect and operation of the recent amendment to the Penal Code respecting the execution of a sentence of death.

206 BEATTY, C. J.

DE HAVEN, J.
HARRISON, J.
PATERSON, J.
McFARLAND, J.

July 21, 1891. Order that Carroll and William Hoff Cook be substituted as attorneys for appellant herein.

August 20, 1891. Case submitted.

December 12, 1891. Judgment and order appealed from. Affirmed.

BEATTY, C. J.

We concur:

207 SHARPSTEIN, J.
McFARLAND, J.
PATERSON, J.

Dissenting opinion:

HARRISON, J.
DE HAVEN, J.
GAROUTTE, J.

Filed at San Francisco, December 12, 1891.

Appeal from the Superior Court of San Francisco County.—D. J. Murphy, J.

208 For appellant, Wilson & Troutt, Carroll Cook, J. E. Foulks, William Hoff Cook.

For respondent, Attorney General W. H. H. Hart.

In Bank.

PEOPLE, *Respondent*, vs. JOHN MCNULTY, *Appellant*. No. 20,659.

The defendant was accused, by information, of the crime of murder, alleged to have been committed in March, 1888. In August, 1888, he was convicted of murder in the first degree, and, in accordance with the law, as it then stood, was sentenced to be hanged by the Sheriff in
209 the county jail. On appeal to this Court the judgment of the Superior Court was affirmed. (26 Pac. R., 597.)

But before a *remittitur* had issued our attention was called to certain amendments to the Penal Code enacted by the last Legislature, pending the appeal, changing the method and time for executing capital sentences, which, it is contended, are inapplicable to the case of this appellant, because they are as to him *ex post facto*, but which at the same time have the effect of repealing the old law under which alone he could have been executed, the result being as claimed, that in consequence of a blunder of the Legislature, he and all others in his situation must
210 go free of all punishment.

For the purpose of considering and determining this important question the judgment of affirmance was vacated and a reargument ordered.

The case having been again argued and submitted, we are now to decide upon the effect of the legislation referred to.

The question involved is no less than this: Whether since the date fixed for the taking effect of the amendatory statute, May 30, 1891, capital punishment can be inflicted in any case of murder, however atrocious, com-

211 mitted prior to that date, and whether in a case like this, where a judgment of death, free from error, had been entered, but not executed prior to said date, any punishment whatever can be inflicted.

The gravity of this question will be better appreciated when it is understood that there are, according to the statement of the Attorney-General, no less than eighteen convicted murderers whose fate depends upon its solution, and who, if it is determined in favor of the contention of the appellant, must be turned loose upon society, unless this Court shall, as his counsel suggests, reverse the judgments with or without reason, and remand the
212 cases for new trials in the hope that the juries before whom they may be again tried, will, as in their discretion they might, impose the lighter penalty of imprisonment for life in order to prevent the most deliberate murders from going absolutely unpunished. We do not, however, feel at liberty to resort to such an evasion, or to convey such a suggestion to the Superior Court. We have already determined that the judgment in this case is free from error; that the appellant was duly and legally convicted and sentenced to die according to the law of the land as it existed at the date of the judgment and at the date of the murder. Other cases must be decided according to the same rule and the same law. If in such cases
213 we find, as we have found in this case, that the judgments are regular and valid, we must so declare, and if it is true, as contended, that the sentence in this case cannot be executed by reason of the repeal of the only law under which it could have been executed, and that the appellant must go free, so must all others in his situation.

With a thorough appreciation, therefore, of the consequences to flow from our decision, we proceed to consider the case:

214 It is to be premised that from an early period in the history of California the crime of murder—the unlawful killing of a human being with malice aforethought—has been divided into two degrees, murder of the first, and murder of the second degree. Without undertaking to state fully the distinction between the two crimes, it is sufficient for our purpose to say that the first degree includes those murders which are marked by deliberation, or cruelty, or which are committed in the perpetration or attempt to perpetrate certain enumerated felonies of the gravest character. It has been the unvarying expression of the legislative will, sustained by the sentiment of the
215 people of California, that such murders deserve the penalty of death by hanging, unless (according to a comparatively recent enactment) the jury trying the case, in their discretion, expressly determined by their verdict that the defendant may be punished by imprisonment in the State Prison for life. (Penal Code, Sec. 190; *People* vs. *Welch*, 49 Cal. 174.) In this law there has been no change since the commission of the homicide of which the appellant was convicted. It remains, with the modification referred to, as it has remained for almost half a century, the settled policy of the State. There has never been manifested any intention on the part of the Legislature, or desire upon the part of the people, that the
216 death penalty in aggravated cases of murder should be abolished. On the contrary, the very latest expression of the legislative will is in favor of its continued infliction with what counsel for appellant contends are added penalties and greater severity, resulting from the different manner prescribed for carrying it into execution.

The recent amendments to the Penal Code, the effects of which we are to consider, do not present the first instance of change made by the Legislature in the manner of conducting the execution of capital sentences. For-

merly, and for a long time, executions were public, but afterwards the law was so amended as to require the execution to be conducted within the jail and with comparative privacy. It has never been contended, so far as we are aware, that this amendment was void with respect to previous offenses on the ground of being *ex post facto*, although we think it would be shown, by reasoning no less logical and upon grounds no more fanciful than are contained in the argument of counsel here, than execution within the walls of a jail before sunrise (*Holden* vs. *Minn.*, 137 U. S. 491), and in presence of the few persons designated by statute, or invited by the Sheriff, would to many convicts be vastly more terrible than execution in public in the light of day, in the presence of all who chose to attend, including friends, relatives and sympathizers. If this is so, or even if it may reasonably be supposed to be so, then, according to the argument, such an alteration of the law would be *ex post facto* and void as to all previous offenses, though it was held otherwise in the case last referred to.

It must be admitted, however, that the Supreme Court of the United States found and declared a distinction material in its view, between the statute of Minnesota—considered in the Holden case—and the statute of Colorado, under which the Medley case arose. (*Ex parte Medley*, 134 U. S. 160.)

In that case Medley was convicted of murder and sentenced to be hanged in the manner and at the time and place prescribed by a statute which did not go into effect, although passed, before he committed the murder. Pending the execution, and while in the custody of the warden of the penitentiary, he sued out a writ of *habeas corpus* in the Supreme Court of the United States, where it was held that the statute referred to prescribed a different and severer punishment than that provided in the stat-

220 ute existing at the date of the murder; that it was, therefore, as to him, an *ex post facto* law, such as the States are by the Federal Constitution forbidden to pass (Art. I, Sec. 10), and incapable of enforcement. It was also at the same time held that since, according to the decision of the Colorado Courts, the amendatory Act had gone into effect, and thereby necessarily repealed the former law regulating the execution of capital sentences, there remained no law under which the petitioner could be punished, and he was accordingly discharged. Evidently if our amendatory statute makes, as is contended, substantially the same changes in our law as were effected by the statute of
221 Colorado, the same results must follow; that is to say, the Sheriff cannot execute the judgment against the appellant; for the law authorizing him to act has been repealed, and if the judgment is modified so as to conform to the new regulation, the Supreme Court of the United States will, as soon as the appellant is committed to the custody of the Warden of the penitentiary, discharge him upon *habeas corpus*. In other words, we have here a Federal question, a question of the validity of a State law depending upon its conformity to the behests of the Constitution of the United States, a question upon which the decisions of the Supreme Court of the United States are of binding and conclusive authority. It becomes necessary, therefore, to carefully examine and compare the two laws, that of Colorado and that of California, in order to determine whether this case falls within the principle of the Colorado case, and is governed by it.

222

The Colorado statute (Laws of 1889, page 118) is quoted at page 163, of Vol. 134, U. S. Rep.

According to the contention of the petitioner in that case, there were no less than twenty variances between the statute in force at the date of the murder and that under which he was sentenced, all of which he claimed

223 to be changes to his prejudice and injury, and therefore *ex post facto*. The Court, however, found it necessary to examine all these specifications, being satisfied that in two important particulars the law was infected with the vice imputed to it. According to the old law every person convicted of murder in the first degree was to suffer death by hanging, at such time as the Court should direct, not less than fifteen nor more than twenty-five days after sentence, unless for good cause the Governor should prolong the time. Pending the execution the prisoner was to be kept in the county jail, under the control of the Sheriff of the county, who was the officer charged with
224 the execution of the sentence. Solitary confinement was neither authorized by the former statute nor was its practice in use in regard to prisoners awaiting the punishment of death. By the new statute the Judge passing sentence of death was required to issue a warrant, directed to the Warden of the penitentiary, appointing and designating therein a week of time within which such sentence must be executed, such week so appointed to be not less than two nor more than four weeks from date of sentence, commanding said Warden to do execution of the sentence imposed, upon some day within the week of time designated in the warrant. This warrant was to be delivered to the Sheriff of the county, whose duty it was made to
225 proceed to the penitentiary within twenty-four hours, and there deliver the prisoner and warrant to the Warden, who thereupon was required to keep the convict in solitary confinement until the infliction of the death penalty, "and," the statute proceeded, "no person shall be allowed access to said convict except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations."

By Section 3 of the Act it was further provided that

226 the Warden should fix the particular day and hour of the week designated in the warrant for carrying out the sentence, and should invite to be present at the execution the Sheriff of the county where the conviction was had, the Chaplain and Physician of the penitentiary, one practicing surgeon—resident of the State—the spiritual adviser of the convict, if any, and six reputable citizens of the State of full age. Besides these official witnesses no person was to be allowed at the execution, except the executioners necessary for the assistance of the Sheriff, and all were forbidden under heavy penalties from divulging to any person, including the prisoner, the hour
227 or day of his death.

The Court held that the provision for solitary confinement in the penitentiary between sentence and execution, and the provision requiring the prisoner to be kept ignorant and in suspense as to the exact time within a whole week when he might be called upon to die, were substantial additions to the punishment previously prescribed, and rendered the act invalid as an *ex post facto* law.

As to other points upon which the Court failed to express an opinion, we can only conjecture what their decision would have been if they had deemed it necessary to discuss them.

228 For the purpose of comparing the law of this State existing at the time the appellant committed the murder of which he was convicted, with the amendments, made or attempted by the Act of 1891 (Laws of 1891, p. 272), we shall quote sections 1217, 1227, and 1229 of the Penal Code, as they existed at the date of the crime, and in their amended form:

The Old Law.

"SEC. 1217. When judgment of death is rendered, a warrant signed by the Judge, and attested by the Clerk under the seal of the Court, must be drawn and delivered

229 by the Sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the time of judgment."

"SEC. 1227. If for any reason a judgment of death has not been executed, and it remains in force, the Court in which the conviction was had, on the application of the District Attorney, must order the defendant to be brought before it, or, if he is at large, a warrant for his apprehension may be issued. Upon the defendant being brought before the Court, it must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make an order that the Sheriff execute the judgment at a specified time. The Sheriff must execute the judgment accordingly."

"SEC. 1229. A judgment of death must be executed
230 within the walls or yard of a jail, or some convenient private place in the county. The Sheriff of the county must be present at the execution, and must invite the presence of a physician, the District Attorney of the county, and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives, or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same."

The Act of 1891.

231

"SEC. 1217. When judgment of death is rendered, a warrant, signed by the Judge, and attested by the Clerk, under the seal of the Court, must be drawn and delivered to the Sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than sixty nor more than ninety days from the time of judgment, and must direct the Sheriff to deliver the defendant, within ten days from the time of judgment, to the Warden of one of the State prisons of this State for execution, such prison to be designated in the warrant."

"SEC. 1227. If, for any reason, a judgment of death has not been executed and it remains in force, the Court

232 in which the conviction is had, on the application of the District Attorney of the county in which the conviction is had, must order the defendant to be brought before it, or if he is at large, a warrant for apprehension may be issued. Upon the defendant being brought before the Court it must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make an order that the Warden of the State prison to whom the Sheriff is directed to deliver the defendant, shall execute the judgment at a specified time. The Warden must execute the judgment accordingly."

"SEC. 1229. A judgment of death must be executed within the walls of one of the State prisons designated by the Court by which judgment is rendered. The Warden of the State prison where the execution is to take place, must be present at the execution, and must invite
233 the presence of a physician, the Attorney-General of the State, and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives, or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same."

A comparison of these sections will demonstrate all the substantial changes—if there are any such—which the Legislature has attempted to make in the old law.

234 It will readily be seen that our statute differs materially from that of the State of Colorado. The day and hour of the execution are not to be kept secret from the prisoner under the new provisions any further than under the old, and the same persons, including those whom he is allowed to designate, are to be present at the execution. Neither is there any express provision for keeping him in solitary confinement during the time which is to elapse between the date of his delivery at the prison and the time of execution, and if the opinion of the Supreme Court of the United States, in Medley's case, had rested

235 solely upon their construction of the meaning of the term "solitary confinement," we should have experienced no difficulty in distinguishing that case from the case before us.

But in truth the context of the Colorado statute shows that the words "solitary confinement" were not used therein in their strict sense.

The language of the Act is as follows:

"Who shall keep such convict in solitary confinement until infliction of the death penalty; and no person shall be allowed access to said convict, except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accord-
236 ance with the prison regulations."

It is scarcely necessary to say that a prisoner who may be visited in prison by his counsel, physician, spiritual adviser, and members of his family, subject only to prison regulations (all prisons, including county jails, being governed by some reasonable regulations), is not kept in solitary confinement, in the strict or usual sense of that term. And this consideration was, no doubt, pressed upon the attention of the Court, for, in their opinion, delivered by Mr. Justice Miller, they say:

"The qualifying phrase in this statute is but a small mitigation of this solitary confinement, for it expressly
237 declares that no one shall be allowed access to the convict except certain persons, and these are not admissible unless their access to the prisoner is in accordance with prison regulations prescribed by the Board of Commissioners of the penitentiary, under Section 2553 of the laws of Colorado, in force since 1877. This section declares that 'the Board of Commissioners of the penitentiary shall make such rules and regulations for the government, discipline, and police of the penitentiary, and *for the punishment of prisoners confined*, not inconsistent with law, as they deem expedient.' What these may be at any particular time is unknown. How far they may permit access of counsel, physicians, the spiritual advisers, and the members of his family, is a ques-

238 tion in their discretion which they exercise by general rules, which may be altered at any time so as to exclude all these persons, and thus the prisoner be left to the worst form of solitary confinement.

"Even the statutory amelioration is a very limited one. By the words 'his attendants' in the statute is evidently meant the officers of the prison and subordinates, who must necessarily furnish him with his food and his clothing, and make inspection every day that he still exists. They may be forbidden by prison regulations, however, from holding any conversation with him. The attendance of the counsel can only be casual, and a very few interviews, one or two, perhaps, are all that he would have before his death, and that of the physician not at all, unless he was so sick as to require it, and the spiritual adviser of his own selection, and the members of his
239 family, are all dependent for their opportunities of seeing the prisoner upon the regulations of the prison. The solitary confinement, then, which is meant by the statute remains of the essential character of that mode of prison life as it originally was prescribed and carried out, to mark them as examples of the just punishment of the worst crimes of the human race."

These extracts from the opinion of the Court show that less importance was attached by the Court to the punishment implied in the "solitary confinement," than to the necessary or usual results of removing a prisoner from the county jail to the State prison, viz.: that he can there be visited by counsel and members of his family
240 less frequently, and only at greater inconvenience, and subject to prison regulations. If we are correct in this construction of the opinion, it follows that this case falls within the principle decided, for in this State, as in any other State, it must inevitably happen that in most instances, the counsel and family of a prisoner will have less convenient access to him in the State prison than when confined in the county jail.

Besides this point of resemblance between the changes made in the Colorado law and that attempted in our own, there is another.

241 By the old law of Colorado the convict was to be executed not less than fifteen nor more than twenty-five days after sentence. By the amended law he was to be executed not less than fourteen nor more than twenty-eight days after sentence. In other words, his days of grace might be abridged one day, or his days of dread and apprehension might be prolonged for three days.

No doubt these were among the twenty particulars in which the amendatory Act was claimed to be in violation of the Constitution of the United States, but the Court did not express an opinion on this point, and we have no means of knowing how it would have been decided if
242 the case had turned upon it.

By reference to Section 1217 of the Penal Code, above quoted, and the proposed amendment, it will be seen that the effect of the amendment, if valid, would be to change the period within which the execution must take place, from not less than thirty nor more than sixty days, to not less than sixty nor more than ninety days after judgment, the result of which is that under the amendment a convict might be kept alive and in dread and apprehension of a painful and ignominious death for thirty days longer than he could have been so kept under the old law.

This change also, it is strenuously argued, and apparently not with authority to sustain the contention, makes
243 the law *ex post facto*. For, in the first place, it is said that although by a vast majority of persons condemned to die on the scaffold any postponement of the date of execution would be eagerly welcomed as a boon, there may be some men to whom it would be an aggravation of their suffering. And, in the next place, it is contended that even if this were not so, the principle that Courts and Legislatures may be allowed to change the punishment of crimes *ex post facto* in such manner as in their

244 opinion renders the penalty lighter cannot be admitted without destroying the value of the constitutional guaranty, because there could be no certainty that the legislative or judicial discretion would always be wisely and mercifully exercised, and neither the legislator nor the Judge is to be allowed to measure the feelings of the culprit by his own. In short, the cases have gone to the extent of holding that a law which changes the punishment of past offenses in any manner whatever, except by remitting a separable portion of the penalty previously prescribed, *i. e.*, by reducing the amount of the fine, the number of stripes, the term of imprisonment, etc., is
245 necessarily void as to all such offenses.

It is unnecessary, however, to cite or to criticise the cases in which this matter has been considered by Courts whose decisions do not bind us as authority when we have a decision of the Supreme Court of the United States which is clearly in point.

We have seen that, under the amendments of 1891, a person convicted of murder in the first degree and sentenced to death, must, within ten days thereafter, be delivered to the Warden of the State prison, and be confined by him for from fifty to eighty days in said prison. If it is in the power of the Legislature to add to the penalty of death by hanging, a previous imprisonment in
246 the penitentiary for eighty days, the term might, under the same power, be extended to years. And, even with respect to a short detention in the State prison, this is what is said in the Medley case by the Supreme Court of the United States, pp. 168-9:

"Instead of confinement in the ordinary county prison of the place where he and his friends reside; where they may, under the control of the Sheriff, see him and visit him; where the Sheriff and his attendants must see him; where his religious adviser and his legal counsel may often visit him without any hinderance of law on the subject, the convict is transferred to a place where

247 imprisonment always implies disgrace, and which, as this Court has judicially decided in *Ex parte Wilson*, 114 U. S. 417; *Mackin* vs. *United States*, 117 U. S. 348; *Parkinson* vs. *United States*, 121 U. S. 281; and *United States* vs. *De Walt*, 128 U. S. 393, is itself an infamous punishment, and is there to be kept in 'solitary confinement,' the primary meaning of which phrase we have already explained."

Various other grounds are insisted upon by counsel as being each in itself sufficient to render the amendments of 1891 unconstitutional. As, that a convict confined in the State prison awaiting execution would, under the general law, as construed in the *Arras Case*, 78 Cal. 304, be compelled to hard labor during his confinement; and,
248 that he would under the operation of Sections 673, 674 of the Penal Code become civilly dead, and be deprived of all civil rights, etc.

We do not think there is anything in these points. There is nothing in the doctrine of the Arras case to sustain the conclusion that a prisoner confined in the penitentiary while awaiting execution could be compelled to labor, and Sections 673, 674, could not be held applicable to such a case.

But upon the other grounds above mentioned, and in conformity to the decision in the Medley case, to the authority of which we are compelled to yield obedience,
249 we feel constrained to hold that neither this appellant, nor any other person in his situation, can be punished under the amendments of 1891, because as to him and all such persons such amendments are *ex post facto* and void.

This conclusion, however, does not dispose of the case, for the appellant was not sentenced to be executed in the manner prescribed by the amendments of 1891, but in the manner provided by the law in force at the date of the murder; that is to say, by the Sheriff in the county jail; and the question is whether that sentence can be

250 enforced. Clearly it cannot be enforced if the old law authorizing the Sheriff to execute capital sentences has been repealed. Such was the conclusion reached in the Medley case, and it is sustained by a long and unbroken line of decisions in the English and American Courts as to the effect of the repeal of penal statutes.

The exact question to be determined, therefore, is whether the old law has been repealed, and this depends upon the further question, whether the amendments of 1891 are in force for any purpose, or to any extent. For if they are not absolutely void as to all offenses, future as well as past, they took effect on the sixtieth day after
251 the Act was approved; and the moment they took effect the old law, at least in so far as it differed from the new, ceased to exist. For the mode of amending laws prescribed by our Constitution was followed in this case by reënacting the various sections of the Penal Code as amended, and under all the decisions of this Court the moment such an amendment takes effect so much of the old law as is not reënacted is repealed.

There is, therefore, we repeat, no escape from the conclusion that if the amendments of 1891 took effect on the 30th of May, 1891, for any purpose, or to any extent, the old law at the same time ceased to exist.

Upon this point the contention of the appellant is that
252 as to all offenses subsequently committed, the Act is valid and free from objection, and that as to them it must be held to be in force with the consequence necessarily involved that the old law stands repealed. The Attorney-General, on the contrary, contends that since by the terms of the amendments they include past as well as future offenses, and since it is for many reasons apparent that the Legislature intended to apply the same punishment to past as to future offenses, and since, in short, the amendatory Act cannot have the effect which the

253 Legislature intended it to have, but only a partial effect followed by a consequence so plainly at variance with the legislative will that it cannot be supposed that the law in its existing form would have been passed if such consequence had been foreseen, the attempted amendments should be declared absolutely and wholly void, and the old law in force.

There can be no doubt that it was the intention of the Legislature to apply the new method of execution in all cases of murder, past, as well as future. The terms of the Act sufficiently indicate this intention, and there is nothing outside of its terms to suggest anything dif-
254 ferent. For it cannot be supposed that a Legislature which makes no change in the definition of murder, or its degrees which preserves the penalty of death by hanging for murder of the first degree, merely designating a different officer, time, and place for executing the sentence, could possibly have intended to grant a complete amnesty to all persons standing convicted of murder in the first degree and awaiting execution. Still less can it be supposed that there was an intention to set apart the period of sixty days between the passing and the taking effect of the law during which murders might be perpetrated by means of torture, poison, lying in wait, or any other cruel and deliberate means, or in the per-
255 petration or attempt to perpetrate arson, rape, robbery, or burglary, with absolute certainty that the perpetrator could not be punished in the manner and the only manner which the people of California and their representatives have ever deemed proper and adequate to such offenses. There is nothing fanciful about this statement. We know that it was a legal impossibility under the law as it stood between March and May, 1891, to complete the process against a murderer within sixty days, if he availed himself of his legal rights, and we know by ref-

256 erence to the cases of Medley and Savage, 134 U. S. 160–177, that in the State of Colorado, two men at least, and we know not how many others, availed themselves of the opportunity presented by the interval between the passage and taking effect of the Colorado Act, to commit cruel and deliberate murders, which, as the law was subsequently construed, they must be presumed to have known could not be punished with death nor punished at all, unless a jury by paltering with their oaths should find them guilty of a crime of lower grade than that which they had committed.

Proceeding then upon the assumption that it was the
257 intention of the Legislature to make the amendments of 1891 applicable to past as well as future offenses, and that they must have known that there were or might be past as well as future offenses to which they would apply, we come next to consider whether the law must be held valid to one class of cases, though necessarily invalid as to the other.

This is not a Federal question, and so far as it may have been involved in the conclusion reached in the Medley case, we are not controlled by that decision.

It clearly appears, however, that the question was not there considered, the only question argued being the construction of the Colorado Act, whether *ex post facto* or
258 not (pp. 162–169). The Supreme Court of Colorado had already decided that the new Act was in force, and necessarily that the old Act was repealed, and upon this purely State question the Supreme Court of the United States merely adopted the conclusion of the State Court. We are therefore free to consider it uncontrolled by any superior authority. The general doctrine upon this subject is clearly and briefly stated at pages 213 and 214 of the sixth edition of Cooley's Constitutional Limitations, as follows:

"A legislative Act may be entirely valid as to some classes of cases, and clearly void as to others. A general law for the punishment of offenses, which endeavors to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in the future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control. A law might be void as violating the obligation of existing contracts, but valid as to all contracts which should be entered into subsequent to its passage, and which, therefore, would have no legal force except such as the law itself would allow. In any such case the unconstitutional law must operate so far as it can, and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the Constitution forbids. If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the Legislature will be defeated if it should be held valid as to some cases and void as to others."

It will be seen from the latter part of the above quotation that the learned author admits, or rather asserts by implication, that there may be cases in which a law, which as to part of its intended purpose can have a constitutional operation, will nevertheless be held wholly void, when it is evident that it would not have been passed except as an entirety, and would, by being given an impartial operation, defeat the general purpose of the Legislature. It will also be observed that the proposition is stated in immediate connection with, and as an exception to, the doctrine as to the construction of statutes which, if allowed a retrospective operation, would impair the obligation of contracts, or would be *ex post facto* laws.

The evident caution with which this rational exception to the general rule is announced by Judge Cooley, is perhaps due to the fact that few, if any, adjudicated cases

262 can be found in which it has been asserted or applied, but it is clear that he perceived the necessity that might arise for its application. And, besides, the exception, as stated, is in substance precisely the same, and rests upon the same principle of statutory construction as that applied in case of an Act, some sections or clauses of which are unconstitutional, while others are free from that objection.

The rule in such cases is that if, when the unconstitutional clauses or sections are stricken out, that part of the Act which remains is complete in itself, *and capable of being executed in accordance with the apparent legislative*
263 *intent*, wholly independent of that which was rejected, it must be sustained. (Cooley's Con. Lim. 211., 6th ed.)

But if the different parts of the Act are so mutually connected with and dependent upon each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and if all could not be carried into effect the Legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional and connected, must fall with them. (*Id.*, pp. 211–212.)

These propositions are sustained by abundant authority cited in the notes under Judge Cooley's text. And there
264 is no reason apparent why the admitted doctrine respecting statutes invalid as to connected conditional and dependent clauses and sections should not equally apply to a statute invalid as to connected, conditional, and dependent purposes and objects. The controlling consideration in both cases must be the same, viz.: that the Courts will not enforce a statute which cannot operate as it was intended by the Legislature to operate, when it is apparent that its partial enforcement will produce effects which the Legislature would never have sanctioned.

265 That this is a sound, wholesome, and even necessary principle of construction we cannot doubt. And we are equally satisfied that it is, as intimated by Judge Cooley, applicable to a statute prescribing or altering the penalties for criminal offenses.

Firmly as we are impressed with the soundness of these views, we are not deterred from applying them to the case before us by the fact that we have not found any decisions of other Courts to the same effect, nor by the fact that we are cited to a number of cases in which an opposite conclusion seems to have been reached. It is to be observed, however, with respect to the cases referred
266 to, that most of them differ very materially from this case. In many of the instances in which new enactments have been held to repeal by implication former laws, under which alone past offenses could be punished, the changes in the law with respect to the definition or classification of offenses, or by way of *mitigating* the penalties of the offense, were so marked and radical as to furnish substantial grounds for holding that the Legislature had intended to declare that the former law was not fit to be enforced. A notable instance of this sort is found in the celebrated Hartung case. (*People* vs. *Hartung*, 22 N. Y. 95; 26 N. Y. 167.)

Mrs. Hartung poisoned her husband at a time when
267 the punishment prescribed by law for murder was death by hanging, to be inflicted within a short time after sentence. Subsequently the law was so altered as to prescribe, as the penalty for the same offense, imprisonment in the penitentiary at hard labor for one year, after which the convict was to be hanged only in case the Governor should in his discretion issue his warrant directing the execution of the death sentence. The result of the various proceedings in the case, and of the two appeals, was that Mrs. Hartung was discharged upon

268 the ground that as to her offense the new law was *ex post facto*, and the old law repealed without any saving clause as to past offenses. But besides the various special reasons impelling the Court to that conclusion, which have no application to this case, there was this additional and sufficient reason why the Court could not hold the new law wholly inoperative. Not only was the old law so changed by the amendatory Act, as practically to substitute life imprisonment for death by hanging as the penalty for murder, but the death penalty was absolutely abolished in some cases where before it had been provided. Under such circumstances the Court might
269 well say that the enactment of the new statute was equivalent to a legislative declaration that the old law was not fit to exist.

And this it seems is the principle upon which repeals by implication, in case of the revision of the penal statutes, rests. By the revision the Legislature is supposed to have declared that the former law is not fit to exist. (*Flaherty* vs. *Thomas*, 12 Allen, 435.)

The principle is intelligible enough and reasonable enough when applied to a revision which changes the classification or definition of offenses, or which sensibly mitigates the penalties formerly imposed for the same offenses. But where, as in the case before us, definition
270 of the offense is in nowise changed, where the punishment instead of being mitigated is, according to the argument, enlarged, and where the manifest and only object of the Legislature was to change the place, the time, and the officer for carrying out the sentence of death, it seems little short of absurd to hold that this amounts to a legislative declaration that the former law is not fit to exist.

We think, on the contrary, that there is here no such declaration, and that we may safely hold, as we do hold,

271 that since the Act of 1891 cannot operate as it was intended to operate, and since the partial operation it might have would defeat the evident intention of the Legislature, and produce consequences which, if foreseen, would have prevented the passage of the amendments, the whole Act is unconstitutional and void, that it never took effect, and the old law remains in force.

This conclusion is to some extent opposed to that reached by this Court in *People* vs. *Tisdale*, 57 Cal. 104; but the ground of our decision herein was not discussed or at all considered in that case, and since no vested rights are dependent upon the former decision, it cannot
272 be regarded a binding precedent.

The judgment and order appealed from are affirmed.

BEATTY, C. J.

We concur:

McFARLAND, J.
SHARPSTEIN, J.
PATERSON, J.

DISSENTING OPINION.

I regret that I am unable to concur in the foregoing opinion and judgment. I concur in that portion thereof which holds that the effect of the amendments of 1891 is to make such a change in the punishment prescribed for
273 murders committed prior to their enactment as to bring them within the definition of an *ex post facto* law, and, therefore, that the punishment herein prescribed cannot be inflicted upon the defendant. I do not, however, concur in the conclusion deduced therefrom, that we must for this reason conclude that the Legislature did not intend that such result should follow, or that, if it had known that such would have been the result, it would not have enacted the amendments.

Neither do I concur in the construction given to the amendments that the punishment for offenses committed

274 while the former law was in force, is so connected with that prescribed for future offenses that we must hold that the Legislature did not intend that offenses thereafter committed should be punished in the mode prescribed by the amendments, unless prior offenses could be also punished in the same manner.

The rule which generally obtains in the construction of statutes is that when a statute is reënacted with certain additions, then for the first time made a part of the law, the provisions of the new Act which are reproduced from the old, and reënacted, are deemed to be mere continuations of the former law, rather than a repeal and a
275 reënactment thereof, and that the portions of the former statute which are omitted from the new are repealed, and are from that time to be regarded as never having been a part of the law, while the new portions are to be regarded as then for the first time presenting the rule of conduct, and are limited in their operation and effect to acts thereafter to be done. It was held in *Billings* vs. *Harvey*, 6 Cal. 381, that Section 24, Article IV of the Constitution of this State, providing that "No law shall be revised or amended by reference to its title, but in such case the Act revised or section amended shall be reënacted and published at length," prescribed a different rule of construction, and that by virtue of this constitutional provision
276 "the reënactment creates anew the rule of action, and, even if there was not the slightest difference in the phraseology of the two, the latter alone can be referred to as the law, and the former stands to all intents as if absolutely and expressly repealed." This rule of construction was afterward reaffirmed by the Court in *Billings* vs. *Hall*, 7 Cal. 3; *Morton* vs. *Folger*, 15 Cal. 284; *Clarke* vs. *Huber*, 25 Cal. 594; *Bensley* vs. *Ellis*, 39 Cal. 313; *People* vs. *Tisdale*, 57 Cal. 104. A similar ruling was made in Texas (*State* vs. *Adams*, 20 Tex. 230) and in Alabama (*Wilkinson* vs. *Ketler*, 59 Ala. 306).

277 Section 325 of the Political Code provides:

"Where a section or a part of a section is amended, it is not to be considered as having been repealed and reënacted in the amended form, but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment."

If the rule of construction applied in the foregoing cases is derived from the Constitution, as was held in *Billings* vs. *Harvey*, it would seem that the Legislature could not by statute change this rule. In *C. P. R. R. Co.* vs. *Shackelford*, 63 Cal. 268, the decision appears to have been made in accordance with the rule laid down in this
278 section of the Political Code, although it is not referred to in the opinion, nor is there any reference to the above decisions, with which it is apparently in conflict. It is, however, unnecessary for the purposes of this case to determine whether the rule laid down in *Billings* vs. *Harvey*, or that prescribed by the Political Code, is to prevail, inasmuch as the portions of the statute which are retained in the amended sections do not call for so much consideration, as does the effect of those portions then first enacted, compared with the portions of the sections omitted from the reënactment. Under well established rules of construction the portions of the
279 original sections which are omitted from the amendments are deemed to have been thereby repealed, and the portions then for the first time enacted are held to constitute the rule of action in reference to the subject-matter therein expressed. All laws are prospective in their operation unless they contain express provision for making them retroactive, and laws prescribing punishment for crimes are essentially limited to future violations of the law creating the offense. Section 3 of the Penal Code declares that "no part of this Code is retroactive unless expressly so declared."

280 The proposition contended for by the appellant is that by these amendments the punishment imposed for the offense has been changed to his disadvantage, as well as increased, and that, as the Legislature provided, no saving clause in the statute for offenses committed prior to its passage, as was done in the statute under consideration in *People* vs. *Gill*, 7 Cal. 356, and as was provided in Section 6 of the Penal Code at the time of the enactment of that Code, there can be no punishment inflicted upon him for his offense, either under the old statute, for the reason that the punishment thereby prescribed has been repealed, or under the new, as that prescribes a punish-
281 ment different from and greater than was provided when the offense was committed, and being *ex post facto*, is therefore unconstitutional and void.

The effect of the repeal of a criminal law is to prevent any further action thereunder. By its removal from the statute book the Court is divested of all authority to try the accused, or, if tried, to pronounce judgment against him. It is immaterial at what stage of the proceedings the repeal takes place; if before trial, the defendant cannot be tried; if after conviction, and before judgment, he cannot be sentenced; if after judgment, and before sentence, he cannot be punished. Unless the proceedings have passed into final judgment, and beyond the neces-
282 sity of any further action by the Court, a repeal of the statute which makes the act an offense, or which defines the punishment for the offense, deprives the Court of all further jurisdiction. Whenever the Court is called upon to take any step, or to do any act which directly or in its consequences will have the effect to punish the defendant for any act done by him, it must find its authority therefor in a statute then existing and in force; and if, subsequent to the commission of the offense, the punishment prescribed therefor has been changed, without any saving

283 clause for previous offenses, the Court is divested of all authority to impose such punishment, and must punish the offender in conformity with the amended statute, unless restricted therefrom by constitutional provisions.

"The repeal of a statute puts an end to all prosecutions under the statute repealed, and to all proceedings growing out of it, pending at the time of the repeal. There can be no legal convictions unless the act is contrary to law at the time it is committed, nor can there be a judgment unless the law is in force at the time of the indictment and of the judgment." (Sedgwick S. and C. Law, p. 130.)

Mr. Bishop says:

284 "No proceedings can be carried on under a law which, being repealed, is not existing to give authority to the Court; consequently if the common or statutory law which authorized a prosecution and conviction for a specific offense is repealed, or expire before final judgment, the Court can go no further with the case. Even if a verdict has been rendered against the prisoner, sentence cannot be pronounced, and he must be discharged." (Bishop on Statutory Crimes, Section 177.)

"When an Act of Parliament is repealed it must be considered, except as to transactions past and closed, as if it had never existed." (Dwarris on Statutes, 160.)

The repeal of a penal statute takes away all right of action for the recovery of the penalty therefor. (*Norris* vs. *Crocker*, 13 How. 429; *Breitung* vs. *Lindauer*, 37 Mich. 285 230.)

"The repeal obliterates the statute as if it had never been passed, and obliterates the penalties as if they had never existed." (*Rood* vs. *R. R. Co.*, 43 Wis. 153.)

"The repeal of the law imposing the penalty is of itself a remission." (Per Taney, C. J., 3 How. 552.)

In *Veaton* vs. *U. S.*, 5 *Cranch*, 281, Chief Justice Marshall said:

"After the expiration or repeal of a law no penalty can be enforced or punishment inflicted for violations of the

286 law committed while it was in force, unless some special provision be made for that purpose by statute."

In 1860 the Legislature of New York passed an Act changing the punishment for murder and repealing the prior law for the punishment of that offense, by virtue of which it was held by the Court of Appeals of that State that the Legislature had so interfered with the laws for the punishment of the crime of murder that a particular class of offenders, embracing the prisoner, could not be punished at all. The effect of this was that all murders which had been committed prior to the passage of that Act, and for which the trial, conviction, and
287 sentence had not taken place, escaped all punishment. (*Hartung* vs. *The People*, 22 N. Y. 95; S. C., 26 N. Y. 167.)

In *State* vs. *Daley*, 29 Conn. 272, the defendant was convicted in July, 1860, of manslaughter committed in May of that year. By an Act passed by the Legislature, which took effect after the commission of the offense and prior to the trial and conviction of the defendant, a change was made in the punishment of manslaughter from imprisonment in the State Prison for a term not less than two nor more than ten years to imprisonment in the State Prison or county jail for a term not exceeding ten years. The Court held that as the statute was
288 prospective only, without any saving clause, the defendant could not be punished, for the reason that the effect of the repeal without any saving clause was to leave no sanction or punishment for that crime applicable to previous offenders.

"The effect of such repeal was for the most obvious reason that the law as to any proceedings under it which were not past and closed, must be considered as if it had never existed, and therefore furnishes no authority after its repeal for the commencement of any proceedings, or for the further prosecution of any which had been before commenced. Hence, it has been often decided that if a provision of either the statutory or common law, which

289 authorizes a prosecution and conviction for a specific offense, is repealed before final judgment, the Court can proceed no further with the case, and that sentence cannot be pronounced, even though a verdict has been rendered against the prisoner, and he must therefore be discharged."

In *State* vs. *Campbell*, 44 Wis. 529, the defendant was charged with the embezzlement of public funds committed in 1876. Before his trial under the charge the Legislature revised the law of the State relative to embezzlement, by an Act which went into effect January 1, 1878. Upon a motion in arrest of judgment the Court held that, inasmuch as the revising Act contained no
290 saving clause, authorizing a prosecution for offenses already committed, there is no law which would authorize or sustain a judgment on the verdict, saying:

"It is true by this construction all offenses committed by public officers under the revised statutes of 1858, which were not prosecuted to judgment prior to the new law taking effect, will go unpunished, but this consequence must rest upon the Legislature, and not the Courts. The Legislature could easily have avoided such a result by enacting a proper saving clause in Chapter 340. As the law now stands we must hold that there is no statute under which it can be punished. We may deplore this, but it is beyond our power to help it without a violation of well-settled principles of law."

291 In *United States* vs. *Tynen*, 11 Wall. 88, the defendant had been indicted for an offense committed against the naturalization laws, and while the matter was pending on appeal to the Supreme Court, Congress passed an Act embracing the whole subject of frauds against the naturalization laws. The Supreme Court, in disposing of the question, held that, although there was no express repeal of the law under which the defendant was indicted, yet, as the provisions of the subsequent Act were repugnant to those of the former, it operated as a repeal, saying:

292 "There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the Act repealed."

In *Flaherty* vs. *Thomas*, 12 Allen, 428, the statute imposing the penalty for an offense was changed after the commission of the act to such an extent that it was held by the Court to be a repeal of the former statute, and that the defendant could not be punished, saying:

"All criminal statutes are limited in effect, and usually in terms to future offenses. The establishment of a new rule of punishment is, of itself, a legislative declaration that the previous rule is not fit to exist, and
293 therefore shall not be applied to any case unless the Legislature, in order to prevent offenses already committed from going unpunished, provides that such offenses shall continue to be punished according to the previous laws. It is clearly settled by authority that in the absence of any such provision the old law cannot be resorted to after the new law has taken effect for the punishment of an offense committed before the passage of the latter, even if the defendant has been already convicted by the verdict of a jury."

In *People* vs. *Tisdale*, 57 Cal. 104, it was held that an amendment in 1880 to Section 607 of the Penal Code, by which the punishment for an offense was changed from
294 a "fine not exceeding one thousand dollars, or imprisonment in the State Prison not exceeding two years," to a fine "not less than one hundred dollars, nor more than one thousand dollars, or by imprisonment in the county jail not exceeding two years, or by both," operated as a repeal of the former statute, and that, as the defendant was not charged with a violation of the statute as it stood after the amendment, he could not be punished under an information filed for a violation of the law before it was repealed. See, also, *Com.* vs. *Kimball*, 21 Pick. 373; *Com.* vs. *McDonough*, 13 Allen, 581; *Kring* vs. *Mo.*, 107 U. S.

295 221; *Garvey* vs. *People*, 6 Colo. 559; *In re Petty*, 22 Kan. 477; *Lindzey* vs. *The State*, 65 Miss. 544; *Shepherd* vs. *The People*, 25 N. Y. 406; *Ratzky* vs. *The People*, 29 N. Y. 124.

By omitting from the sections as amended the provisions authorizing the judgment to be executed by the Sheriff, and within the county where the conviction was had, the Legislature deprived the Court of all power to authorize such execution by the Sheriff, or within the county jail, and also took from the Sheriff all capacity to execute the judgment. The amendments had the effect to obliterate from the statute all the provisions that were
296 not reënacted, as completely as if they had never formed a part thereof. The omitted portions became as if they had never existed, and the new portions are to be construed as if none had preceded them.

It is urged by the Attorney-General that in case it shall be held that the sections as amended provide for a greater punishment than the original sections, such provision would be unconstitutional and void, and that therefore the amended sections are themselves unconstitutional and inoperative to effect a repeal of the former sections; and it is held in the prevailing opinion that because it is unconstitutional to apply the punishment prescribed by the amendments to one convicted of an
297 offense committed prior thereto, the amendments are thereby affected with such an unconstitutional element that it defeats their operation in reference to offenses subsequently committed.

It is undoubtedly a correct proposition that the provisions of a statute will not be affected by a subsequent unconstitutional Act of the Legislature, and that a clause in such Act repealing all other Acts which are inconsistent therewith will not affect the prior statute. The unconstitutional Act is to be regarded as wholly void and

298 inoperative, even for the purpose of displacing or overruling that for which it is sought to be made a substitute. (*Ex parte Davis*, 21 Fed. Rep. 396; *Tims* vs. *State*, 26 Ala. 165; *State* vs. *Crozier*, 12 Nev. 300; *State* vs. *Hallock*, 14 Nev. 202; *In re Petty*, 22 Ark. 489; *Campau* vs. *Detroit*, 14 Mich. 276.)

It is also a fundamental rule of construction that a statute is not to be declared unconstitutional unless it be clearly so, and also that "if the statute is susceptible of two constructions, one of which is consistent and the other inconsistent with the restrictions of the Constitution, it is the plain duty of the Court to give it that
299 construction which will make it harmonize with the Constitution, and comport with the legitimate powers of the Legislature." (*People* vs. *Frisbie*, 26 Cal. 139.)

The Legislature is not presumed to have intended to pass an unconstitutional Act, and, unless the Act clearly falls within some express prohibition of the Constitution, or is beyond the power of the Legislature, it is the duty of the Courts to uphold rather than to set it aside. All laws are presumed to have been passed with deliberation, and with a knowledge on the part of the Legislature of the existing laws, and any statute, purporting either expressly or impliedly, to repeal an existing law, is deemed to have been passed with the intent on the part of the
300 Legislature to make such change.

There is nothing in the terms of the sections as amended in 1891 which are repugnant to any provision of the Constitution, or beyond the powers of the Legislature to adopt. It will not be disputed that it was entirely competent for the Legislature, when originally defining crimes and their punishment, to provide that judgment of death should in all cases be carried into effect by the Warden of a State prison and within its walls. Its power in this respect was not exhausted by its first exercise.

301 It has the same power to-day to prescribe a different punishment for any crime, that it originally had to fix the punishment therefor. It was within the power of the Legislature to abolish capital punishment. It could even grant an amnesty for all murderers by simply repealing the section providing for their punishment, and, however much we may conjecture that the Legislature would not purposely free a criminal from punishment, or however much we may think that it did not in the present case intend to grant an amnesty for any offense, we can only determine its intent by what it has said. "The result may or may not be conformable to the actual intent of
302 those who passed the latter statute. We can only ascertain the legal intent of the Legislature by the language which they have used, applied, and expounded conformably to the settled and well-known rules of construction." (*Commonwealth* vs. *Kimball*, 21 Pick. 376.)

"If the Legislature by the Act of 1860 carelessly or unintentionally repealed the law punishing the prisoner's crime, that is no reason why reasonable and well-settled principles of construction should be disregarded for the purpose of punishing it under that Act." (*Shepherd* vs. *The People*, 25 N. Y. 411.)

"It is not a sufficient answer to the difficulty to say that the members of the Legislature did not probably
303 intend to grant impunity to offenders in the situation of the prisoner. They did intend to abrogate as to her and as to all persons in the same situation the former punishment, and that design they effectually carried out. They intended also that such offenders should be punished in another way, but this they could not effect on account of the constitutional inhibition." (*Hartung* vs. *The People*, 26 N. Y. 170.)

"The Legislature might have inserted in the repealing Act a saving clause which would have prevented the

304 defendant's escape, if they had seen fit to do so. If they omitted it through mistake, the Court cannot correct the mistake. *Nor have we a right to decide that the omission was by mistake.*" (*Commonwealth* vs. *McDonough*, 13 Allen, 585.)

The Legislature has done no Act, nor has it given utterance to any expression which authorizes the inference that it did not intend the amendments to be operative unless they applied to all offenders, and I know of no other mode of ascertaining the intention of the Legislature in reference to what it has enacted than the language of its Act. The rules for the construction of statutes
305 are simple, and do not vary with the subjects to which the statutes are directed. While the statement of the Attorney-General respecting the number of persons charged with murder who will be affected by the statute would have been properly presented to the Legislature when that body had the Act under consideration, it can have no weight with this Court in construing the effect of the statute. If we should assume that the Legislature knew that those persons would be affected by its action, and passed the amendments with such knowledge, or that it enacted them in the belief that they would not affect such previous offenders, we must still concede that such legislation was within the powers of the Legislature,
306 and that we are not at liberty to set it aside because its effect is different from what we may infer that that body anticipated. If, on the other hand, we assume that the Legislature enacted the amendments in the opinion or belief that there were no previous offenders to whom they could be made applicable, it merely results that the amendments were enacted without sufficient consideration or examination; and such has never been held a sufficient ground for disregarding the plain language of a statute. Whether we are to assume that the Legisla-

307 ture acted advisedly or without consideration, I know of no rule of construction by which we are at liberty to investigate the extent of its knowledge, or the want of consideration it gave to its action, and therefore, in applying the well-settled rules of construction to the amendments under consideration, we are simply to determine whether the amendments themselves are by their terms inconsistent with the Constitution. If an attempt is made to apply the law as found in these amendments to cases which are not within their terms, it results that in the instance in which such attempt is made there is but the not unusual case of an offense against society, for the
308 punishment of which the law has not made adequate provision.

It cannot be questioned that it was the intention of the Legislature, by the amendments under consideration, to provide that all judgments of death should thereafter be executed within the walls of a State prison. It has specifically declared this intent in express language, and, if there had been no murder committed in this State prior to the passage of the Act of 1891, the intent of the Legislature as to the place of punishment would have been undoubted. By thus amending these sections of the Penal Code it has as effectually shown its intent to repeal the former provisions for the place in which the
309 punishment of death should be executed as if it had shown its intention by abrogating those provisions in express language.

It is conceded in the argument on behalf of the people that if the amendatory statute had contained a saving clause for the punishment of crimes committed prior to its passage, there would have been no constitutional objection to its validity. The omission of such saving clause cannot, however, make invalid a law which would otherwise be valid. The constitutionality of its pro-

310 visions is to be determined by their own harmony with the Constitution, and not by the effect which additional provisions would have had upon the subject-matter to which the Act is applied. The statute as amended is not, in its terms, unconstitutional. Its unconstitutionality does not spring from any provision which is contained therein, but arises only when it is sought to apply its provisions to cases which are not within its terms. This is not, however, a defect which is inherent in the statute, but is a want of power to apply the statute to cases for which it makes no provision, and results from the application of other principles of the Constitution which are
311 intended for the protection of individual rights, and which are equally sacred and potent as those which are made for maintaining government, or for the punishment of crime. A law which it is within the power of the Legislature to pass is constitutional, although it may be unconstitutional to apply it to acts or prosecutions had prior to its passage.

In the same clause of the Constitution which prohibits the passage of *ex post facto* laws is the prohibition of laws impairing the obligation of contracts. The statue books of the several States, as well as of this State, contain many laws of a general nature which violate this latter provision, and which have been held constitutional in
312 their application to future transactions, although inoperative as to prior ones. Under the rule for amendment provided by the Constitution, any section of the Codes is to be amened by its reënactment as amended. In civil matters no saving clause is required. The former law is held to have entered into the contract to such an extent as to be beyond the power of the Legislature to deprive the parties to the contract of the rights thereby acquired, but in matters of criminal legislation, unless the saving clause is contained in the amended section, the State, as

313 represented by the Legislature, is deemed to have remitted the penalty incurred in the commission of the offense. The amended section is not unconstitutional, but it is unconstitutional to apply it to transactions had prior to its passage. "A legislative Act may be entirely valid as to some classes of cases, and clearly void as to others. A general law for the punishment of offenses which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void, as far as it was retrospective, but such invalidity would not affect the operation of the law in regard to the cases which were within
314 the legislative control." (Cooley Con. Lim. p. 213; *Jaehne* vs. *N. Y.*, 128 U. S. 189; *State* vs. *Amery*, 12 R. I. 64; *U. S.* vs. *Hall*, 2 Wash. C. C. 373.)

The principle contained in the prevailing opinion in this case leads necessarily to this result, either that any amendment to that portion of the Penal Code defining crimes and punishments which the Legislature may enact without a saving clause for prior offenders, is *ipso facto* unconstitutional, and without its power to enact, or that its validity is to depend upon the conjecture of the individuals who may be the members of this Court, respecting the intention of the individuals who may have been members of the Legislature at the time the amendment
315 was enacted. If the doctrine be correct that because a law which is prospective in its operation, and which in terms is consistent with the Constitution, is unconstitutional as to future offenses because it cannot be applied to past offenses, it must follow that the Court has imposed a restriction upon the Legislature which is not found in the Constitution. If, on the other hand, such law is to be declared unconstitutional whenever the members of this Court shall be of the opinion that the Legislature did not intend what it has expressly and unqualifiedly

316 declared, the certainty of law is substituted by the conjecture or will of the Court. *Misera est servitus ubi jus est vagum aut incertum.*

In none of the instances wherein similar legislation has been construed by the Courts of other States, has it been even suggested that such legislation was unconstitutional, for the reason that its effect could not have been anticipated by the Legislature; and, although the decisions of those Courts have no binding authority upon us, yet in a matter which involves only the determination of the proper rules of construction in criminal law, the unanimity of decision in other States is an authority of
317 the most persuasive character. And the rule of construction is the same whether the statute to be construed has reference to the punishment of the highest crime defined in the law, or to the slightest misdemeanor. These rules are as uniform for all laws as is the constitutional prohibition against an *ex post facto* law.

The rule that a statute which is in part unconstitutional will be declared wholly so is applicable only when it can be seen from the Act itself that the unconstitutional part is the "condition or consideration" upon which the other part was enacted, or that the two parts are so interdependent that one cannot exist without the other. If the different parts are separable, or if the subjects to
318 which the Act may have a constitutional application are separable from the others, it will not be declared unconstitutional. This rule was laid down with his usual clearness by Chief Justice Shaw in *Warren* vs. *The Mayor*, 2 Gray, 99, where he limits such results to a case where the parts of the statute "are so mutually connected with and dependent on each other as conditions and considerations, or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that if all could not be carried into effect, the Legislature would not pass the residue independently."

319 In the case of *Fisher* vs. *McGirr*, 1 Gray, 21, that able jurist had said: "That where a statute has been passed by the Legislature under all the forms and sanctions requisite to the making of laws, some part of which is not within the competency of legislative power, or is repugnant to any provision of the Constitution, such part thereof will be adjudged void and of no avail, whilst all other parts of the Act not obnoxious to the same objection will be held valid, and have the force of law."

There is nothing in the statute under consideration indicating that the punishment of previous offenders according to its terms was a condition or consideration for providing that subsequent offenders should be so punished, nor is the punishment of these classes in any
320 respect so interdependent that the one cannot exist without the other. The statute presents the not infrequent case of a law applicable to certain acts, but inapplicable to others by reason of paramount law. The intention of the Legislature, as expressed in its language, is that it shall be applicable in all cases, but this intention cannot be carried out as to certain cases, by reason of a constitutional inhibition.

In *Telegraph Co.* vs. *Texas*, 105 U. S. 460, a statute of the State of Texas provided for a tax upon every telegraphic message sent by any company doing business within the State. The Court held that the Act was uncon-
321 stitutional, in so far as it was applicable to messages sent out of the State, but valid as to those sent within the State, applying the same principles which had previously been held by it in the case of *The State Freight Tax*, 15 Wall. 232. See, also, *Philadelphia S. S. Co.* vs. *Penn.*, 122 U. S. 339. In a similar case, *Fargo* vs. *Michigan*, 121 U. S. 241, the Court said: "The taxing law of the State was, therefore, valid, as to the latter class of transportation, but with regard to the others it was invalid, because it was interstate commerce, and the State could lay no tax upon it."

322 In 1880 various Acts were passed amending the sections of the Penal Code for the purpose of adapting them to the new Constitution, many of which affected the punishment previously prescribed for offenses, but none of these Acts contained any saving clause for prior offenses. In 1874 Section 190 of the Penal Code was amended by giving to the jury the discretion to award punishment in the State prison for life, instead of death, as the penalty for murder in the first degree. (Am. to Code, 1873–4, p. 457.) In 1889, Section 261 of the Penal Code, defining rape, was amended by making the age of consent fourteen years instead of ten. (Stats. of 1891, p. 223.) In neither
323 of these statutes was there any saving clause for prior offenses. Very many other sections of the Penal Code have been amended by the Legislature without making provision for the effect of such amendments upon previous offenders.

If I correctly apprehend the principles maintained in the prevailing opinion herein, any of these amendments to the Penal Code is unconstitutional, if it can be shown that at the time of its enactment there were cases pending in Court in which individuals charged with crime might have gone unpunished, by reason of the statute in force when the crime was committed having been repealed by the amendment. The invalidity of the
324 statute cannot depend upon the fact that the person then charged with the crime did not avail himself of such defense. The statute is to be tested by the conditions existing when it was passed, and if it would at that time have been declared unconstitutional for that reason, it is equally so to-day, and its unconstitutionality can be invoked by any one against whom it is sought to be enforced. If the amendments of 1891 are unconstitutional for the reasons given in the prevailing opinion. they could not be enforced against one who committed murder after

325 their enactment, even though those whose crimes were committed prior thereto did not assert such unconstitutionality. If at the time of the amendment of Section 190, in 1874, there were persons charged with murder prior to that date, that Act as it now stands upon the statute book must be construed unconstitutional, for the reason that it provided such a possible change for the punishment of an offender as to be within the inhibition of an *ex post facto* law. I do not think that such a conclusion can be maintained, and for that reason I cannot concur in the conclusion reached by the majority of the Court in the present case.

326 In reaching the conclusion that the amendments to the Penal Code, in 1891, have so changed the punishment for the offense of which the defendant was convicted that it cannot be imposed upon him, and that there is no existing law for the punishment of his offense, I have not failed to consider that the crime committed by him must go unpunished, but however much this result may be regretted, it is not for this Court to prevent it. The criminal, as well as the upright, is entitled to be protected in the rights guaranteed to him by the Constitution. That instrument has been framed as the basis and limit of all legislation, and the lowest, as well as the highest, is entitled to its protection. It is one of the functions
327 of this tribunal to prevent hasty or ill-considered legistion from infringing upon the limitations therein prescribed, and however great might be our desire, we cannot avoid the responsibility of declaring such legislation inoperative, even though the effect of our decision be that crimes will go unwhipped of justice, or criminals be restored to society.

"It is better that any criminal go unpunished than that any provision of the Constitution shall be disregarded or that the foundations of the criminal law shall

328 be unsettled." (*Lindzey* vs. *The State*, *supra*.) "Though it is desirable that all offenders against our penal laws should be punished, yet it is better that one should occasionally escape than that the fundamental principles of the criminal law should be violated." (*Com.* vs. *McDonough*, *supra*.)

In my opinion, the judgment of the Court below should be affirmed; but inasmuch as since it was pronounced the Legislature has so changed the law as to deprive the Court of the power to enforce its judgment, that Court should be directed, upon the filing of the remittitur therein, to enter an order discharging the defendant from
329 custody.

HARRISON, J.

I concur in the foregoing opinion of Mr. Justice Harrison:

DEHAVEN, J.

I concur:

GAROUTTE, J.

Indorsed: Filed December 12, 1891.

L. H. BROWN,
Clerk of Supreme Court.

DECEMBER 31, 1891.

330 Appellant filed petition for rehearing.

JANUARY 11, 1892.

THE COURT: Rehearing granted.

Justices McFarland and Paterson dissenting.

Filed January 12, 1892.

L. H. BROWN, Clerk.
By GEO. E. MADISON, Deputy.

331 *In the Supreme Court of the State of California. In Bank.*

No. 20,659.

PEOPLE, *Respondent*, vs. MCNULTY, *Appellant*.

JANUARY 11, 1892.

THE COURT: Rehearing granted.

Justices McFarland and Paterson dissenting.

Thereafter said cause was argued, additional briefs filed, and cause submitted.

FEBRUARY 20, 1892.

The judgment and order appealed from affirmed, and Superior Court ordered to take further proceedings in accordance with this opinion.

332 McFARLAND, J.

We concur:

PATERSON, J.
GAROUTTE, J.
SHARPSTEIN, J.
BEATTY, C. J.

We dissent:

HARRISON, J.
DE HAVEN, J.

Filed at San Francisco, February 20, 1892.

Appeal from the Superior Court of San Francisco County. D. J. Murphy, J.

333 For appellant, Wilson & Troutt, Carroll Cook, and J. E. Foulds; Wm. Huff Cook, of Counsel.

For respondent, Attorney-General Hart.

In Bank.

THE PEOPLE, *Respondent*, vs. JOHN MCNULTY, *Appellant*.

No. 20,659.

The appellant was convicted of murder in the first degree, and sentenced to suffer the penalty of death; and from the judgment and an order denying a new trial he appealed to this Court. The Court examined and con-

334 sidered all the points made on the appeal, determined that no error had been committed at the trial, and ordered the judgment affirmed. (26 Pac. R. 597.) Afterwards, however, and before the remittitur went down, upon the suggestion of a difficulty caused by amendments of the law concerning the death penalty, which had been enacted by the Legislature after the conviction of the appellant, the judgment of affirmance was set aside and an argument ordered as to the effect of said amendments. The amendments, if constitutional, repealed the former law upon the subject, and contained no express saving clause by which past offenses might be punished under the law as it stood
335 at the time of their commission. But under the authority of the recent decision of the Supreme Court of the United States in *Ex parte Medley*, 134 U. S. Rep. 160, the change made by said amendments in the punishment was so material as to render it as against appellant *ex post facto*, and void under the Constitution of the United States; and as the amendments, if constitutional, repealed the former law, there seemed to be no means left by which the appellant could be punished. The main question, therefore, before the Court on the first argument was whether the amendments were not unconstitutional *in toto*, and thus inoperative as a repeal of the former law; and a majority of the Court reached the conclusion, upon
336 the views then presented, that it was so unconstitutional, and therefore left the law as it stood before the attempted repeal. The question, however, was of such importance that a majority of the Court ordered a rehearing and a reargument.

The opinions of both the majority and minority of the Court, on the first hearing of the question, were based upon the assumption that the amendment under review stood entirely without a saving clause, either in the amendment itself or in the general statutory law.

337 Since the rehearing was granted our attention has been called, for the first time, to Section 329 of the Political Code, as constituting a saving clause fully covering the said amendments; and if it does constitute such a saving clause, then the question presents an entirely different aspect. In that event the Legislature could not be held as either intending the new law to apply to past offenses, or as intending to allow past offenders to escape; but construing the new law as passed, with the knowledge and in the light of the permanent saving clause existing in the general body of the law, it is clearly constitutional as to future crimes, while it leaves past offenses to be
338 punished under the law as it was when the offenses were committed.

It is quite clear that a general saving clause, if it be clothed in apt language to express the purpose, is as efficient as a special clause expressly inserted in a particular statute. This proposition is too plain to need the support of authorities; but there *are* authorities directly to the point. *People* vs. *Quinn*, 18 Cal. 121; *U. S.* vs. *Barr*, 4 Sawyer, 254; *Jordan* vs. *The State*, 38 Ga. 585; *Volmer* vs. *The State*, 34 Ark. 487; *Acree* vs. *Commonwealth*, 13 Bush. Ky. 653; *State* vs. *Shaffer*, 21 Iowa, 486; *State* vs. *Ross*, 49 Mo. 416.

339 In the statutory law of a number of the States there is a general saving clause intended to prevent the miscarriage of justice in cases where the Legislature should repeal, or substantially change a penal statute and neglect to put a special saving clause into the new enactment. Congress has enacted such a general saving clause, which is found in Section 13 of the Revised Statutes; and when applying it, in *United States* vs. *Barr*, *supra*, the U. S. District Court explains the purpose and effect of such a provision, as follows:

340 "This Section 13 is a salutary provision, and if it, or something like it, had always been incorporated in the statutes of the States, and the United States, it would have prevented many a lame and impotent conclusion in criminal cases, in which the defendant escaped punishment because the Legislature, in the hurry and confusion of amending and enacting statutes, had forgotten to insert a clause to save offenses and liabilities already committed or incurred from the effect of express or implied repeals."

The said Section 13, and the saving clauses in the legislation of the various States which have enacted them, are all somewhat different from each other, and from Section 329 of our Political Code; but they all have the
341 same general purpose, viz.: to prevent the mischief mentioned by the U. S. District Court as above quoted; and the language employed in each of them should be construed in the light of that purpose. Some examples of saving clauses in other States are as follows: In Georgia the language employed is: "All crimes and offenses committed shall be prosecuted and punished under the laws in force at the time of the commission of such crime or offense, notwithstanding the repeal of such laws before such trial takes place." In Arkansas the language is: "When any criminal or penal statute shall be repealed, all offenses committed or forfeitures incurred under it
342 while it was in force shall be punished or enforced as if it were in force, notwithstanding such appeal, unless otherwise expressly provided in the repealing statute." And in Iowa the language is: "The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceedings commenced under or by virtue of the statute repealed." These examples are sufficient to show the main purpose in view, and the variety of language used to express it.

343 Section 329 of our Political Code is as follows:

"The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment, information, or punishment is expressly declared in the repealing Act."

Now, the impression which a first reading of this section naturally leaves upon the mind of the reader is, that it is substantially the same as the saving clauses in other States to which we have alluded; and closer inspection of the language used, and full consideration of the objections made to it by appellants, only make that first im-
344 pression stronger and surer. The stress of appellant's argument is upon the words "law *creating* a criminal offense;" and the contention is that a law repealing the punishment of an offense is not to be brought within the meaning of a law repealing a law "creating" an offense. (We do not deem it necessary to here quote in full the old and the new law upon which the question under discussion arises. It is sufficient to say that when appellant committed the crime of which he was convicted certain sections of the Penal Code provided for the death penalty; and that afterwards, on March 31, 1891, the Legislature passed an Act by which it amended and reën-
345 acted those sections, and in the sections thus reënacted provided for what is admitted to be a different and more severe punishment. The sections of the Penal Code which define murder were not changed. The most important sections of the Penal Code thus changed are Sections 1217, 1227, and 1229, and the Act changing them is to be found commencing on page 272 of the Statutes of 1891. The Act contained no expression of intent to bar an indictment or information for a past offense, or the punishment thereof.)

The contention of appellant rests upon the position

346 that the description, or definition, of acts necessary to constitute a crime creates the crime, and that unless the definition in a law creating a crime is repealed, there is no repeal of such law within the meaning of the Political Code. But that position cannot be maintained. A description of acts necessary to constitute a crime does not make the commission of such acts a crime; punishment is as necessary to constitute a crime as definition. Without either there is no crime; and the repeal of either leaves no crime. What constitutes a crime is definitely stated in Section 15 of the Penal Code as follows: "A crime or public offense is an act committed or omitted in
347 violation of a law forbidding or commanding it, *and to which is annexed*, upon conviction, either of the following *punishments:* First, death; second, imprisonment; third, fine; fourth, removal from office; or, fifth, disqualification to hold and enjoy any office of honor, trust, or profit in this State." And so we think that a close analysis of Section 326 removes all the refined distinctions by which its apparent general purpose is sought to be thwarted.

The case of the *State* vs. *Shaffer, supra*, is very much like the case at bar. In that case Section 4324 of the Criminal Law of Iowa had been amended after the commission of the crime charged against the defendant so as to merely change the punishment, and it was contended
348 that the amendment took away the jurisdiction of the Court in which he was tried. But the Court, after citing Section 29, which contained the general saving clause (heretofore quoted in this opinion), says: "The amendment to Section 4324 is to be construed in connection with this section, and with such section it is equivalent to adding to such amendment, 'provided that such amendment shall not affect any penalty incurred under the section aforesaid.' This subdivision of Section 29 of the revision was not presented by counsel, and hence not

349 passed upon by the Court, in the case of the *State* vs. *Burdick*, 9 Iowa, 402." In *People* vs. *Tisdale*, 57 Cal. 104, there is some discussion of Section 329 of the Political Code; but at the time of the commission of the crime there charged the defendant could have been proceeded against by indictment only, and not by information; and at the time of the decision Section 329 did not contain the word "information."

But the defendants were prosecuted by information under a subsequent law; and the Court held that Section 329 could not be applied, because there was no power to inject into it the word "information," saying: "We do
350 not think that the respondents in this case could be held to answer for the offense with which they are charged, 'unless on presentment of a Grand Jury.'" This is all that was decided, and it does not touch the point involved in the case at bar. It seems clear enough that the section, at least as it then stood, could not be applied to the attempted prosecution by information of a crime which at the time of its commission could be prosecuted only by indictment; but the extent to which the Court discusses the question there involved shows that it must have considered Section 329 as of wide-reaching influence. There are no other decisions in this State to which our attention has been called that throw further
351 light upon the question.

It is quite clear that the Act of March 31, 1891, repealed all contained in the sections amended that is not contained in the said sections as reënacted, and thus repealed the former punishment. Indeed, counsel for appellant not only admit this proposition, but they declare it as the very basis of their contention that there is now no law by which their client can be punished. They say in their brief: "That these amendments *absolutely* and *completely* wiped out the old sections

352 of the Penal Code there can be no question." And this is clearly so. The language of the Act, as to each section, is that the section "is hereby amended so as to read as follows," and, of course, everything not put into the section as reënacted vanished. The effect of such a reënactment is well stated in the opinion of the Court in *State* vs. *Ingersoll*, 17 Wis. 634. It was there contended that a certain Section 5 of Chapter XXXV of the Revised Statutes had not been repealed; but the Court say: "We are satisfied, however, that this is a mistake, and that that section had been repealed by Chapter CXLVII above referred to. For that chapter provides
353 that 'Section 5, Chapter XXXV of the Revised Statutes, entitled 'of excise.' is hereby amended *so as to read as follows*,'" etc.

Now, the conclusion is irresistible that any provision of Section 5 not found in this chapter is repealed. This must be so, since the Legislature says expressly that that section shall thereafter read and be to the effect following; then going on to enact a complete substitute for the former provision. In what clearer manner could the Legislature indicate its intention to supersede, change, and repeal Section 5 than by the one adopted? It is amended so as to read and be to the effect therein prescribed, and quite different from what it was as it formerly
354 existed. An examination of our statutes will show that this method of superseding and changing the existing law is frequently resorted to, and it certainly leaves no room to doubt as to what the Legislature intended. The Legislature, in effect, says that such a provision of law shall be read and construed to be as therein declared, and shall have no other meaning or effect given to it. (See case of *The State* vs. *Andrews*, 20 Texas, 230.) Section 5, therefore, being superseded, changed, and repealed by Chapter CXLVII, was not in force when the trial was had

355 in this case, and furnished no authority to the Court to give judgment upon it. It can no more be said to exist, for the purpose of regulating the punishment applicable to the offense here complained of, than one committed since the law of 1862 went into operation. (See, also, on this point, *United States* vs. *Barr*, 4 Sawyer, 254.) And, of course, the materiality of the difference between the punishment as prescribed by the old section and the punishment prescribed by them as reënacted, is admitted by appellant, for upon that materially depends his whole contention that the reënactments are as to him *ex post facto*.

356 Our conclusion is, that under Section 329 of the Political Code, the appellant is to be punished under the law as it existed at the time of the commission of the crime of which he was convicted; and that, under this view, the said Act of March 31, 1891, is constitutional, because not intended to apply to past offenses, but to be prospective only in its operation.

The judgment and order appealed from are affirmed, and the Superior Court is directed to take further proceedings in accordance with this opinion.

McFARLAND, J.

We concur:

PATERSON, J.

357 SHARPSTEIN, J.

GAROUTTE, J.

BEATTY, C. J.

We dissent:

HARRISON, J.

DeHAVEN, J.

Indorsed: Filed February 20, 1892.

L. H. BROWN, Clerk.

By D. S. Culp, Deputy Clerk.

358 March 15, 1892. Appellant filed petition for writ of error to United States Supreme Court, in words and figures following, to wit:

In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*, vs. JOHN MCNULTY, *Appellant*. No. 20,659.

Petition for allowance of writ of error to the Supreme Court of the United States.

To the honorable W. H. Beatty, Chief Justice of the Supreme Court of the State of California:

The appellant in the above-entitled action hereby
359 respectfully petitions the Supreme Court of the State of California and the honorable Chief Justice thereof, to make, in the above-entitled cause, an order allowing said appellant a writ of error to the Supreme Court of the United States from the final judgment and order made and entered in said cause in said Supreme Court of California.

This petition is based upon the following facts and grounds, viz.:

Said appellant was, on the 6th day of August, 1888, convicted of the crime of murder in the first degree, in the Superior Court of the State of California, in and for
360 the City and County of San Francisco, and was, upon such conviction, sentenced by said last named Court, on the 25th day of August, 1888, to be hanged by the neck until he should be dead.

The murder, of which said appellant was convicted and sentenced, was committed on the 25th day of March, 1888.

After such conviction and sentence said appellant appealed to the Supreme Court of California from said judgment of said Superior Court.

On the 25th day of March, 1888, the only law which

361 authorized the execution of said judgment was that provision of the Penal Code of California contained in Sections 1217 and 1229.

Pending said appeal the Legislature of the State of California passed a statute amending said provisions of said Penal Code, and repealing portions thereof, which new statute was approved, and became the law of the State of California on the 31st day of March, 1891, and is to be found in the Statutes of 1890–91, at page 272.

The Supreme Court of California, upon the aforesaid appeal, decided that the last mentioned law was *ex post facto* as to said appellant, if enforced. Subsequently, said
362 last mentioned Court decided upon said appeal, that said last mentioned law could not be enforced, as against said appellant, but held that the same did, as to all other persons, repeal the aforesaid sections of said Penal Code. In so deciding said appeal, said Supreme Court also decided that said appellant could be executed in accordance with the judgment appealed from, as aforesaid, under the provisions of said Penal Code.

The provisions of the Constitution of the United States prohibit the Legislature of this State from passing any *ex post facto* laws, and appellant claims that said Statute of 1890–91 is *ex post facto*, and is therefore in conflict with the provisions of the Constitution of the United States,
363 and therefore void as to said appellant.

Appellant further claims that said sections of said Penal Code having been repealed, as aforesaid, there exists now no law in this State to authorize his execution, and if executed under the said final judgment of said Supreme Court, he will have been deprived of his life without due or any process of law, and contrary to the Constitution of the United States.

Appellant upon this application makes, in addition to what herein precedes, the following specifications and

364 ASSIGNMENTS OF ERROR:

First—That it appears upon the face of the judgment in said cause that defendant has never been legally or otherwise indicted or presented by any Grand Jury, and that he has been proceeded against by information made and filed by the District Attorney of the City and County of San Francisco. And it does not appear by said judgment, or by the record, that prior to the filing of such information he had had a legal or any examination before, or that he had been legally or at all committed by, any magistrate. On the contrary such information was filed without any legal examination and commit-
365 ment, and without any examination and commitment at all, by any magistrate.

Second—That the said proceedings, as well as the laws and Constitution of the State of California attempting to authorize them and the alleged verdict of the jury, the judgment appealed from, as well as the judgment of this Court, are in conflict with, and prohibited by, the fifth and fourteenth articles of amendment of the Constitution of the United States, and with Article IV of said Constitution, and they are therefore void.

Third—That said defendant was held to answer for the said crime of murder, charged by the information herein
366 against him by the District Attorney of the City and County of San Francisco, upon an information filed by him, and was tried and illegally found guilty of said crime without any presentment or indictment of any grand or other jury, and that the judgment rendered upon the alleged verdict of the jury in such case was and is void, and if executed will deprive the said defendant of his life and liberty without due process of law.

Fourth—That since the time of the verdict and judgment herein the Legislature of the State of California, by its Act which went into effect May 30, 1891, repealed Sec-

367 tions 1217, 1227, and 1229 of the Penal Code of the State of California, and if said defendant be executed under said repealed sections he will be deprived of his life and liberty without due process of law.

Fifth—That since the verdict and judgment herein the Legislature of the State of California, by Act which went into effect May 30, 1891, amended Sections 1217, 1227, and 1229 of the Penal Code of the State of California, and said amended law is the only law of the State of California for the execution of a judgment of murder in the first degree by hanging, and said amended law is *ex post facto* and void as to this defendant, and if executed
368 thereunder he will be deprived of his life and liberty without due process of law.

Wherefore, appellant prays that he may be allowed the writ of error herein asked for, and that a stay of proceedings be ordered in said cause until the final determination thereof.

Respectfully,

CARROLL COOK,
J. E. FOULDS,
Attorneys for Appellant.

---

369 March 21, 1892. Order of Court staying remittitur until decision of Court on petition for writ of error to United States Supreme Court.

May 31, 1892. Writ denied.

June 1, 1892. Remittitur issued to County Clerk of the City and County of San Francisco.

October 12, 1892. Filed citations from United States Supreme Court on writ of error, heretofore copied in this record.

October 13, 1892. Filed acceptance of service of writ, citation, and supersedeas by C. S. Laumeister, Sheriff of

370 the City and County of San Francisco, and W. H. H. Hart, Attorney-General of California, as hereinbefore set forth in this certificate.

November 14, 1892. Filed petition of plaintiff in error for writ of error, in words and figures following, to wit:

In the Supreme Court of the United States.

In the matter of the petition of John McNulty for a writ of error to the Supreme Court of the State of California:

To the honorable L. Q. C. Lamar, Associate Justice of the Supreme Court of the United States:

371 The petition of John McNulty respectfully showeth that your petitioner is a resident of the United States, residing in the State of California, but a subject of the Kingdom of Great Britain, and that he is now imprisoned or restrained of his liberty, and confined unjustly, illegally, and without authority of law, as he is advised and believes, by C. S. Laumeister, the Sheriff of the City and County of San Francisco, in the State of California, for some criminal, or supposed criminal, matter, as appears by the copies of the indictment, judgment, and sentence of the Court, and the commitment, which will be found in the certified copy of the transcript of the record pre-
372 sented herewith at pages 1 to 4, inclusive.

Your petitioner further shows that an information for murder was filed against him by the District Attorney of the Superior Court, in and for the City and County of San Francisco, State of California, on the 26th day of April, 1888 (see transcript of record, pp. 1–4), which said information charges that your petitioner did, on the 25th day of March, 1888, in the City and County of San Francisco, State of California, willfully and of his malice aforethought, kill and murder one James Collins, and in pursuance thereof this petitioner was, at the — term of

373 said Superior Court, in and for the City and County of San Francisco, State of California, to wit, on the 6th day of August, 1888, tried upon said information, and found guilty by the jury of murder in the first degree, as appears by a certified copy of the verdict, page —, of the Transcript.

And on the same day the Court pronounced judgment and sentence of death against your petitioner, as appears by the Transcript, at page 17.

Your petitioner, on the 19th day of November, 1888, was granted an appeal from the judgment and sentence, to the Supreme Court of the State of California, the
374 highest Court of the State, in which a decision in your petitioner's case could be had, where, on the 19th day of February, 1892, an opinion was delivered by four of the Justices, affirming the judgment of the trial Court, and a dissenting opinion by three of the Justices against such affirmance. (Trans., pp.—.)

The final order of the Supreme Court of the State of California, pursuant to its majority opinion affirming the judgment of the Court below, was made and recorded on the 10th day of September, 1892. (Trans., p.—.)

Your petitioner further represents that at the time the alleged murder of which he was convicted was committed, the law of the State of California provided that
375 the penalty for such crime was that he should be hanged, and that was the only penalty for the crime at the time of his conviction and sentence. (Penal Code, Cal., Sec. 187; approved March 28, 1874.)

Your petitioner was accused, tried, convicted, and sentenced under *that* statute, and the judgment was rendered in accordance therewith. At the time the alleged crime was committed, and at the time of conviction and sentence, the penalty of hanging was required to be performed in the county jail of the county where the con-

376 viction was had, and within sixty days after judgment. (Penal Code, Cal., Secs. 1217–1229; approved February 14, 1872.)

Your petitioner was allowed an appeal to the Supreme Court of the State as aforesaid, and pending such appeal the Legislature of the State so amended the statutes above referred to, under which your petitioner was accused, tried, convicted, and sentenced to be hanged, that they were absolutely and completely repealed, without a saving clause as to the former statutes. (Stats. 1890–91, p. 272; approved March 31, 1891.) The "old" and "new" statutes are printed on pages 9, 10, and 11 of petitioner's brief for rehearing, filed in the Supreme Court
377 of California, and presented with this petition.

Your petitioner shows, therefore, that the statutes under which he was tried, convicted, and sentenced had been repealed without a saving clause, and that the changes in the penalty, and in the manner of its execution, in capital cases made by the new statutes, is to the disadvantage of your petitioner, adds to the punishment of death, and makes his punishment greater and more aggravated, as follows: (1) The time of imprisonment is increased; (2) his confinement is changed from the county jail to State prison, where he is subjected to the rules of such prison, and also to solitary confinement; (3) the place of execu-
378 tion is changed; (4) change of executioner; (5) changes the place of imprisonment; (6) adds travel; (7) changes the officer who may suspend the sentence; (8) changes the tribunal, place, manner, and proceedings of trying and determining the insanity of a convicted prisoner; (9) the power and discretion of the Court to prolong the time of execution is taken away; (10) by putting the prisoner in the State prison instead of the county jail, he is deprived of his civil rights, and under the law becomes civilly dead. For the above and other reasons

379 which may appear in the record, your petitioner's punishment was added to and changed, to his disadvantage, by the statutes enacted subsequent to the commission of the crime, and the trial, conviction, and sentence for the same.

Your petitioner submits, therefore, that the provisions of the Penal Code, approved March 28, 1874, and also of the Penal Code, approved February 14, 1872, have been repealed, without a saving clause, and cannot be enforced against him in the execution of the judgment and sentence in this case. And he further submits that the provisions of the Act of March 31, 1891 (Stats. 1890–91, p. 272), have so changed and added to his pun-
380 ishment as to make the statute an *ex post facto* law as to your petitioner and his alleged crime, and in contravention of the following provisions of the Constitution of the United States, to wit:

Art. I, Sec. 9. "No bill of attainder or *ex post facto* law shall be passed."

Art. I, Sec. 10. "No State shall pass any bill of attainder or *ex post facto* law," etc.

And your petitioner further represents that the validity of the statutes of the State of California, under which he is now imprisoned and restrained of his liberty, and under which he is under sentence to be hanged on the
381 14th day of October, 1892, and their repugnance to the Constitution of the United States, were drawn in question and decided adversely to him in the Supreme Court of the State of California, and the decision of such Federal question by the Supreme Court of said State was necessary to the final decision of said case, apart and distinct from any other question involved, whereby your petitioner has been deprived of his liberty and is about to be deprived of his life without due process of law.

Wherefore your petitioner says there is manifest error

382 in the decision and proceedings of the Court below, and prays that a writ of error may be issued to the Supreme Court of the State of California, in accordance with the law in such cases provided, and that the errors in said case, if any, may be reëxamined, reviewed, and corrected; for a supersedeas and stay of the judgment and sentence, and proceedings against your petitioner pending such writ of error, and for a certiorari; and your petitioner will ever pray, etc.

CARROLL COOK,
A. H. GARLAND,
H. J. MAY,
Attorneys for Petitioner.

383 Indorsed: Filed November 14, 1892.

L. H. BROWN,
Clerk of the Supreme Court.

November 14, 1892. Appellant filed his assignment of errors on writ of error from Supreme Court of the United States, in words and figures following, to wit:

In the Supreme Court of the United States.

JOHN MCNULTY, *Plaintiff in Error*, vs. THE PEOPLE OF THE STATE OF CALIFORNIA, *Defendant in Error.*

Assignment of Errors.

384 Afterwards, to wit: at the October term for 1892 of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes the said John McNulty, by Carroll Cook, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I.

That at the time the alleged murder of which said McNulty was convicted was committed, the law of the State of California provided that the penalty and pun-

385 ishment for such crime was that he should be hanged, and that was the only penalty for such crime at the time of his conviction and sentence. (Penal Code of Cal., Sec. 187; approved March 28, 1874.)

Said McNulty was tried, convicted, and sentenced under *that* statute, and the judgment was rendered in accordance therewith. At the time the alleged crime was committed, and at the time of conviction and sentence, the penalty of hanging was required to be performed in the county jail of the county where the conviction was had, and within sixty days after judgment. (Penal Code of Cal., Sections 1217 to 1229; approved February 14,
386 1872.) Said trial and conviction was had in the Superior Court of the State of California, in the City and County of San Francisco. An appeal was allowed to and taken by said McNulty to the Supreme Court of the State aforesaid from such judgment, and, pending such appeal, the Legislature of the State of California so amended the statutes above referred to, under which said McNulty was accused, tried, convicted, and sentenced to be hanged, that they were absolutely and completely repealed without any saving clause as to the former statutes. That the changes in the said penalty and in the manner of its execution, in capital cases, made by said new statutes, is to the disadvantage and detriment of said McNulty, adds
387 to the punishment of death, and makes his punishment greater and more aggravated, as follows: (1) The time of imprisonment is increased; (2) his confinement is changed from the county jail to the State prison, where he is subjected to the rules of such prison, to hard labor, and to solitary confinement; (3) the place of execution is changed; (4) The executioner is changed; (5) changes the place of imprisonment; (6) adds travel; (7) changes the officer who may suspend the sentence; (8) changes the tribunal, place, manner, and proceedings of trying

388 and determining the insanity of a convicted prisoner; (9) the power and discretion of the Court to prolong the time of execution is taken away; (10) the prisoner is taken away from and deprived of the comfort of his friends, relatives, and counsel; (11) the prisoner is prevented from enjoying consultation with his counsel, and with clergy of his acquaintance and choosing; (12) by putting the prisoner in the State prison instead of the county jail he is deprived of his civil rights, and under the law becomes civilly dead.

For the above and other reasons appearing in the record said McNulty's punishment was added to and
389 changed to his disadvantage by the statutes enacted subsequent to the commission of the alleged crime, and the trial, conviction, and sentence for the same; and the judgment of the Supreme Court of the State of California was erroneous in ordering the execution of said McNulty after such changes had been made in the said statutes.

II.

That, as shown by the facts set forth in the record and in the first assignment of error herein, the provisions of Section 187 of the Penal Code of California, approved March 28, 1874, and also of Sections 1217 to 1229 of said Code, approved February 14, 1872, have been repealed,
390 without any saving clause, and cannot be enforced against said McNulty in the execution of the judgment and sentence in the case, and the Supreme Court of the State of California erred in its judgment ordering said McNulty executed under such repealed statutes.

III.

That the provisions of the Act of March 31, 1891, Statutes of California, 1890–91, p. 272, have so changed and added to the punishment of said McNulty as to make said statute an *ex post facto* law as to said McNulty and

391 his alleged crime, and in contravention of the following provisions of the Constitution of the United States, to wit:

Art. 1, Sec. 9. "No bill of attainder or *ex post facto* law shall be passed."

Art. 1, Sec. 10. "No State shall pass any bill of attainder or *ex post facto* law," etc.

Therefore the Supreme Court of the State of California erred in its judgment ordering the execution of said McNulty.

IV.

That by reason of the passage by the Legislature of the
392 State of California, and the approval of the Act of March 31, 1891, Statutes of California, 1890–91, p. 272, the only laws under which the judgment of conviction and sentence pronounced against said McNulty could be executed, were absolutely and completely repealed and abrogated. In consequence of which repeal and abrogation there was not, at the time the judgment of the Supreme Court of the State of California was rendered, nor is there now, any law of said State which authorizes or permits the execution of said judgment, and its execution would be in direct violation and contravention of the following provisions of the Constitution of the United States, to wit:

Art. V, of the amendments thereof, which provides
393 that no person shall be deprived of his life, liberty, or property without due process of law.

Art. XIV, Sec. 1, of the amendments thereof, which provides as follows, viz.: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." Therefore the Supreme Court of the State of California erred in ordering,

394 by its judgment, that said McNulty should be executed under said judgment.

V.

That the Supreme Court of the State of California erred in its decision that the judgment against said McNulty could be executed by the Sheriff of the City and County of San Francisco.

VI.

That the Supreme Court of the State of California erred in its decision that the judgment against said McNulty could be executed in the county jail of the City and County of San Francisco.

395 VII.

That the Supreme Court of the State of California erred in its decision that the judgment against said McNulty could be executed at all.

VIII.

That the Supreme Court of the State of California erred in not deciding that said McNulty should be discharged from custody, and in not ordering his discharge therefrom.

IX.

That the Supreme Court of the State of California erred in its decision that said McNulty was not held in custody
396 in violation of the laws and Constitution of the United States.

X.

That the Supreme Court of the State of California erred in not ordering the discharge from custody of said McNulty, and in ordering his execution under the judgment rendered against him, the record showing that his detention and imprisonment under said judgment was illegal and without any authority of law or justification, and in violation of the Constitution and laws of the United States.

397 XI.

That the order made by the Supreme Court of the State of California, in its final judgment against said McNulty, was made without any authority of law, and is therefore void.

XII.

That the statutes of the State of California which formerly authorized the making and rendering of the judgment pronounced against said McNulty, to wit: Sections 1217 to 1230, inclusive, of the Penal Code of the State of California, were absolutely repealed and abrogated by an Act of the Legislature of the State of California, entitled
398 "An Act to amend Sections 1217, 1220, 1221, 1223, 1224, 1225, 1226, 1227, 1229, and 1230 of an Act entitled 'An Act to establish a Penal Code,' approved February 14, 1872, relative to execution of judgments of death," approved March 31, 1891. By reason whereof said McNulty claims that the said judgment rendered against him, and affirmed by the Supreme Court of the State of California, was so affirmed without any authority of law whatever, and that if executed thereunder he will be deprived of his life and liberty without due process of law, and in violation of, and contrary to, the provisions of the fifth and fourteenth articles of amendment of the Constitution of the United
399 States, as well as the Constitution of the State of California, and as a consequence the said judgment of affirmance was error.

XIII.

There is no law of the State of California, nor was there any such at the date of the making of the judgment and order appealed from, authorizing the detention or imprisonment of persons convicted of murder in the first degree and sentenced to death, other than that mentioned in the twelfth assignment of error herein. That the only punishment provided by the laws of the State

of California, other than the one mentioned in said assignment of error, is imprisonment in the State prison for life. That, in consequence of said facts, said McNulty claims that said decision and judgment of said Supreme Court of the State of California is an attempt on the part of said State to deprive him of his liberty without due or any process of law, and contrary to the provisions of the Constitution of the United States; and, if executed thereunder, that he will be deprived of his life without due or any process of law, and contrary to the provisions of said Constitution.

XIV.

That the Supreme Court of the State of California had no jurisdiction, authority, or power to render the decision and judgment which it did render, for the reasons stated in the dissenting opinion of Justices Harrison, De Haven, and Garoutte, filed in said action on 12th day of December, 1891, in said Court, and contained in the record herein.

XV.

That the Supreme Court of the State of California had no jurisdiction, authority, or power to render the decision and judgment which it did render, for the reasons stated in the opinions of said Court, written by Chief Justice Beatty, filed in said action on the 12th day of December, 1891, in said Court, and contained in the record herein.

XVI.

That it appears upon the face of the judgment in said cause, and in the record herein, that said McNulty has never been legally or otherwise indicted or presented by any Grand Jury, and that he has been proceeded against by information made and filed by the District Attorney of the City and County of San Francisco, and it does not appear by said judgment or by said record prior to

403 the filing of such information he had had a legal or any examination before, or that he had been legally or at all committed by any magistrate. On the contrary, such information was filed without any legal examination and commitment, and without any examination and commitment at all by any magistrate.

XVII.

That the proceedings, as well as the laws and Constitution of the State of California, attempting to authorize them, and the verdict of the jury, are in conflict with and prohibited by the fifth and fourteenth articles of amendment of the Constitution of the United States,
404 and are therefore void.

XVIII.

That said McNulty was held to answer for the crime of murder charged by the information in said action against him by the District Attorney of the City and County of San Francisco, and was tried and found guilty of said crime without any presentment or indictment of any grand or other jury, and that the judgment rendered upon the said verdict in such case was and is void, and, if executed, will deprive said McNulty of his life and liberty without due process of law.

405 XIX.

There is error also in this, to wit: That the final judgment and decision of the Supreme Court of the State of California, in said action, affirmed the judgment of the lower Court of said State, and directed said lower Court to proceed in said action according to the opinion of said Supreme Court as expressed in said final decision and affirmance; whereas, by the law of the land and the Constitution of the United States, the said decision and judgment of said Supreme Court ought to have been given for the said McNulty, and in accordance with the dissent-

406 ing opinion filed in said action on the 12th day of December, 1891, and contained in the record in said action.

XX.

The Supreme Court of the State of California erred in not ordering and directing the discharge of said John McNulty from custody.

XXI.

The Supreme Court of the State of California erred in not reversing the judgment which had been taken by appeal to said Court from the Superior Court of said State by said John McNulty.

407 XXII.

That the Sheriff of the City and County of San Francisco had no authority to confine or detain in custody or under arrest the said John McNulty.

Wherefore the said John McNulty prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, and that said Supreme Court of the State of California be ordered to enter an order directing the Superior Court of said State, in and for the City and County of San Francisco, to discharge the said John
408 McNulty from custody, and reversing the judgment of said Superior Court.

CARROLL COOK,
Attorney for Plaintiff in Error.

Indorsed: Filed November 14, 1892.

L. H. BROWN, Clerk.

I, L. H. Brown, do further certify that the foregoing (printed pages 1-137) constitutes a full, true, and correct copy of the record

409 and proceedings and opinions filed in cause No. 20,659, wherein the People of the State of California is plaintiff and respondent, and John McNulty is defendant and appellant; that said record consists of the transcript on file, the certified copy of the charge of the Court, the minute order of the judgment, and all motions and orders thereon, and made in said cause, and each of the opinions heretofore rendered in said cause, and constitutes all the papers on appeal in said cause excepting the arguments and briefs.

Witness my hand L. A. Brown
and the seal of Clerk Supreme Court
the Court annexed of the State of California.
This 23d day of
Nov, 1892.

(Seal)

Office Supreme Court U. S.
FILED.
APR 14 1893
JAMES H. McKENNEY,
CLERK.

1253

Supreme Court of the United States.

October Term, 1892.

JOHN McNULTY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

No.

In Error to the Supreme Court of the State of California.

Brief for Plaintiff in Error.

CARROLL COOK,
For Plaintiff in Error.

BACON PRINTING COMPANY, SAN FRANCISCO.

Supreme Court of the United States

OCTOBER TERM, 1892.

JOHN MCNULTY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.
} No.

In Error to the Supreme Court of the State of California.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The really material facts in this case are few and not complicated, notwithstanding the length of the record.

The plaintiff in error was prosecuted in the State Courts of California, for the crime of murder. Such prosecution was by a *Criminal Information* filed by the District Attorney in the Superior Court of the City and County of San Francisco, State of California, (Rec., 6). The information charges McNulty, the plaintiff in error, with the murder of one Collins on March 25th, 1888, and it was filed by the District Attorney on April 26th, 1888 (Rec., 7). Upon this information, plaintiff in error was arrested, pleaded not guilty, was tried, and convicted, (Rec., 15) and sentenced to be

hanged (Rec., 37). From such judgment of conviction plaintiff in error appealed to the Supreme Court of the State of California, on November 21st, 1888 (Rec., 38). On November 11th, 1890, said cause was submitted in said Supreme Court for decision (Rec., 65). On May 1st, 1891, said Supreme Court decided said appeal, filing an opinion and entering a judgment therein, affirming the judgment of the lower court (Rec., 69). *That* opinion, however, forms no part of the issues now before *this* Court for decision. (Rec., 66.) On May 27th, 1891, said Supreme Court, of its own motion, ordered said last mentioned judgment of affirmance vacated and set aside, in order that the cause could "be argued upon the question of the effect and operation of the recent amendment to the Penal Code *respecting the execution of a sentence of death.*" (Rec., 69.) On August 20th, 1891, the cause was re-argued on the said question, which was a question of constitutionality of the amendments, under the U. S. Constitution, and was submitted. (Rec., 69.) On December 12th, 1891, said Supreme Court again affirmed the judgment appealed from. (Rec., 69.) In its decision upon such last mentioned affirmance, said Supreme Court was *divided* in opinion, four of the Justices thereof being of opinion that the judgment appealed from should be affirmed, and three of them dissenting. (Rec., 69.) The prevailing opinion was to the effect, that the amendments to the Penal Code of the State, under consideration, were wholly unconstitutional, as contrary to the Constitution of the United States (Rec., 70); the dissenting opinion being that such amendments were *not* wholly unconstitutional, but that they were *ex post facto* laws, so far as the plaintiff in error was concerned, and therefore void as to *him*. (Rec., 91.) *Both* opinions agreed upon the fact that the said amendments were, so far as the plaintiff in error was concerned, *ex post facto*, and contrary to the provisions of the Constitution of the United States. (Rec., 70and 91.)

On December 31st, 1891, a petition for a rehearing was filed in said Supreme Court (Rec., 110), and on January 11th, 1892, such rehearing was granted by said Supreme Court. (Rec., 110.) Thereafter, the cause was argued, additional briefs filed, and was again submitted. (Rec., 111.) On February 20th, 1892, the judgment appealed from was again affirmed by a majority of the Court, two of the Justices thereof still dissenting. (Rec., 111.) In the opinion filed upon the *last* mentioned judgment of affirmance, the Court does not undertake to retract the conclusions reached in the previous opinions, that the amendments under consideration were *ex post facto* as to plaintiff in error, but concludes that, as *by reason of the provisions of the Constitution of the United States*, McNulty could not be hanged under such amendments, the same are inapplicable as to his case, and that he should be proceeded against under a provision, not of the Penal, but the Political Code of the State. (Rec., 111.) On March 15th, 1892, plaintiff in error filed, in said Supreme Court, a petition for a writ of error to the Supreme Court of the United States (Rec., 120), which petition was, on May 31st, 1892, denied by said Supreme Court of California. (Rec., 123.) Thereafter, a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of California was presented to the late Justice Lamar, of this Court, who, on October 4th, 1892, ordered such writ to issue, (Rec., 1) and on the 4th day of October, 1892, such writ did issue out of and under the seal of this Court. (Rec., 3.)

The question put in issue before the Supreme Court of California was, whether plaintiff in error could, *in view of the provisions of the Constitution of the United States*, be hanged, under the judgment appealed from. (Rec., pp. 70 and 71.)

The crime of which plaintiff in error was convicted, was committed on March 25th, 1888, (Rec., 6). He was convicted on August 6th, 1888, (Rec., 14) and judgment was

rendered on October 6th, 1888 (Rec., 64). At the time of his conviction and of judgment, as well as at the date of the commission of the crime, the statutes of the State, contained in the Penal Code thereof, read as hereinafter set forth under the title *Old Law*, (Rec., 76) and in 1891 said statutes were amended so as to read, as hereinafter set forth under the title *New Law*, (Rec., 77), viz:

Old Law.	**New Law.**
§ 1217. When judgment of death is rendered, a warrant, signed by the Judge, and attested by the Clerk under the seal of the Court, must be drawn and delivered to the Sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than *thirty* nor more than *sixty* days from the time of judgment.	§ 1217. When judgment of death is rendered, a warrant, signed by the Judge, and attested by the Clerk, under the seal of the Court, must be drawn and delivered to the Sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than *sixty* nor more than *ninety* days from the time of judgment, *and must direct the Sheriff to deliver the defendant, within ten days from the time of judgment, to the Warden of one of the State Prisons of this State for execution, such prison to be designated in the warrant.*
§ 1220. No Judge, Court or officer, other than the Governor, can suspend the execution of a judgment of death, except the Sheriff, as provided in the six succeeding sections, unless an appeal is taken.	§ 1220. No Judge, Court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the *Warden of the State Prison to whom he is delivered for execution*, as provided in the six succeeding sections, unless an appeal is taken.
§ 1221. If, after judgment of death, there is good reason to suppose that the defendant has become insane, the Sheriff of the County, with the concurrence of the Judge *of the Court by which the judgment was rendered*, may summon from the list of jurors selected by the Supervisors for the year a jury of twelve persons, to inquire into the supposed insanity, and must give immediate notice thereof to the District Attorney of the County.	§ 1221. If, after judgment of death, there is good reason to suppose that the defendant has become insane, *the Warden of the State Prison to whom he is delivered for execution*, with the concurrence of the Judge of the *Superior* Court *of the County in which such prison is situated*, may summon from the list of jurors selected by the Supervisors for the year, a jury of twelve persons, to inquire into the supposed insanity, and must give immediate notice thereof to the District Attorney of such County.
§ 1223. A certificate of the inquisition must be signed by the jurors and the *Sheriff*, and filed with the Clerk of the *Court in which the conviction was had.*	§ 1223. A certificate of the inquisition must be signed by the jurors and the *Warden*, and filed with the Clerk of the *Superior* Court *of the County in which such State Prison is situated.*

OLD LAW—Continued.

§ 1224. If it is found by the inquisition that the defendant is sane, the *Sheriff* must execute the judgment; but if it is found that he is insane, the *Sheriff* must suspend the execution of the judgment until he receives a warrant from the Governor, or from the Judge of the Court *by which the judgment was rendered*, directing the execution of the judgment. If the inquisition finds that the defendant is insane, the *Sheriff* must immediately transmit it to the Governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment.

§ 1225. Relates to female prisoners who may become pregnant.

§ 1226. Is upon the same subject as the last section.

§ 1227. If for any reason a judgment of death has not been executed, and it remains in force, the Court in which the conviction *was* had, on the application of the District Attorney, must order the defendent to be brought before it, or if he is at large, a warrant for *his* apprehension may be issued. Upon the defendant being brought before the Court, it must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make an order that the *Sheriff* execute the judgment at a specified time. The *Sheriff* must execute the judgment accordingly.

§ 1229. A judgment of death must be executed within the walls *or yard of a jail, or some convenient private place in the county. The Sheriff of the county* must be present at the execution, and must invite the presence of a physician, the *District Attorney of the County*, and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the Gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execu-

NEW LAW—Continued.

§ 1224. If it is found by the inquisition that the defendant is sane, the *Warden* must execute the judgment; but if it is found that he is insane, the *Warden* must suspend the execution of the judgment until he receives a warrant from the Governor or from the Judge of the *Superior* Court *of the County in which such State Prison is situated*, directing the execution of the judgment. If the inquisition finds that the defendant is insane, the Warden must immediately transmit it to the Governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment.

§ 1225. Relates to female prisonors who may become pregnant.

§ 1226. Is upon the same subject as the last section.

§ 1227. If for any reason a judgment of death has not been executed, and it remains in force, the Court in which the conviction *is* had, on the application of the District Attorney *of the County in which the conviction is had*, must order the defendant to be brought before it, or if he is at large, a warrant for .... apprehension may be issued. Upon the defendant being brought before the Court, it must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make an order that *the Warden of the State Prison to whom the Sheriff is directed to deliver the defendant shall* execute the judgment at a specified time. The *Warden* must execute the judgment accordingly.

§ 1229. A judgment of death must be executed within the walls of *one of the State Prisons designated by the Court by which judgment is rendered. The Warden of the State Prison where the execution is to take place* must be present at the execution, and must invite the presence of a physician, *the Attorney General of the State*, and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the Gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends,

OLD LAW—Continued.	NEW LAW—Continued.
tion, together with such peace-officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.	not to exceed five, to be present at the execution, together with such peace-officers as he may think expedient to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

The position taken, upon the question involved, by plaintiff in error, is fully set forth and sustained by authorities in both the prevailing and the dissenting opinions first filed thereon in said Supreme Court, especially in the said *dissenting* opinion. (Rec., 70 and 91.)

First Assignment of Error.

The first assignment of error is as follows:

"That at the time the alleged murder, of which said McNulty was convicted, was committed, the law of the State of California provided that the penalty and punishment for such crime was, that he should be hanged, and that was the *only* penalty for such crime at the time of his conviction and sentence. (Penal Code of Cal., Sec. 187, Approved March 28, 1874.) Said McNulty was tried, convicted and sentenced under *that* statute, and the judgment was rendered in accordance therewith. At the time the alleged crime was committed, and at the time of conviction and sentence, the penalty of hanging was required to be performed in the County Jail of the County where the conviction was had, and within sixty days after judgment. (Penal Code of Cal., Sections 1217 to 1229, Approved February 14, 1872.) Said trial, and conviction was had in the Superior Court of the State of California, in the City and County of San Francisco. An appeal was allowed to and taken by said McNulty to the Supreme Court of the State aforesaid, from such judgment, and, pending such appeal, the Legislature of the State of California so amended the statutes above referred to, under which said McNulty was accused, tried, convicted and sentenced to be hanged, that they were absolutely and completely repealed *without any saving clause* as to the former statutes. That the changes in the said penalty and in the manner of its execution, in capital cases, made by said

new statutes, is to the disadvantage and detriment of said McNulty, *adds to* the punishment of death, and makes his punishment greater and more aggravated, as follows: (1), the time of imprisonment is increased; (2), his confinement is changed from the County Jail to the State Prison, where he is subjected to the rules of such prison, to hard labor and to solitary confinement; (3), the place of execution is changed; (4), the executioner is changed; (5), changes the place of imprisonment; (6), adds travel; (7), changes the officer who may suspend the sentence; (8), changes the tribunal, place, manner and proceedings of trying and determining the insanity of a convicted prisoner; (9), the power and discretion of the Court to prolong the time of execution is taken away; (10), the prisoner is taken away from, and deprived of the comfort of, his friends, relatives and counsel; (11), the prisoner is prevented from enjoying consultation with his counsel, and with clergy of his acquaintance and choosing; (12), by putting the prisoner in the State Prison instead of the County Jail he is deprived of his civil rights, and under the law becomes civilly dead. For the above and other reasons appearing in the record, said McNulty's punishment was *added to* and *changed to his disadvantage*, by the statutes enacted *subsequent* to the commission of the alleged crime, and the trial, conviction and sentence for the same; and the judgment of the Supreme Court of the State of California was erroneous in ordering the execution of said McNulty after such changes had been made in the said Statutes." (Rec., 128, 129.)

The questions presented under this assignment of error are not entirely novel: they have been met and determined before, in other states than California, and in other Courts. It is true, that the history of legislation in the State of California does not show a like question to have arisen there until now; but where other Courts have, after study and deliberation, settled similar questions, their conclusions should, in a case where the consequences are so great as they are in this, have been adopted by the Courts of that state; or at least, have caused those Courts, where human life was in the balance, to indulge in the feeling that there might be a *reasonable doubt* as to the correct decision in the cause,

and, following the spirit and doctrines of our laws, compel the solution of such doubt to be made in the way most favorable to the accused, and thus have accorded to him the benefit of the doubt to which he is by law entitled.

In this case, our first claim on behalf of the plaintiff in error is:

That, having been convicted of the crime, to wit: murder in the first degree, before the present law relative to executions became a law, he cannot legally or constitutionally be executed under it.

As shown by the record in the case, (Rec., 6,) the murder of which he was convicted was committed on the 25th day of March, 1888. At THAT time the law of the State provided that the penalty for such crime should be SIMPLY that he should be hanged. (Penal Code of Cal., Sec. 187, approved March 28th, 1874.) Such likewise was the ONLY penalty for said crime at the time of his conviction. While *that* statute was in force and effect, the defendant was tried, convicted, and sentenced, the judgment in the cause having been rendered in accordance therewith. (Rec., 64.) After such judgment was pronounced, an appeal was taken and perfected to the Supreme Court of California. At the time of the commission of said crime, as well as at the time of such conviction and sentence, the said penalty of hanging was required to be performed in the County Jail of the County where the conviction was had, and within sixty days after the pronouncing of judgment. (Penal Code of Cal., Secs. 1217 and 1229, approved Feb'y 14th, 1872.)

Pending such appeal, the Legislature of the State of California passed the statute amending such then existing statutes, which new statute was approved and became the law of the State on the 31st day of March, 1891. (Stats. 1890–91, p. 272.)

That these amendments *absolutely* and *completely* wiped out the old sections of the Penal Code, there can be no question. It is *not neeessary* that *express words* be used to repeal a

statute. The passage of an amendatory and inconsistent statute, of itself, repeals all former laws upon the same subject. No person can today be executed in accordance with the former laws of the State; those laws have ceased to exist, and it is now unlawful for any execution to be had in a county jail; the only lawful place for the carrying out of such, being in the several State Prisons of the State.

The new statute has been *substituted* for the old. The very title of the amendatory act, as well as the enacting clause thereof, demonstrates this fact, for it declares that such sections of the Code shall be amended so as *to read* as follows, and then *re-enacts* the sections. The enacting clause of such amendatory act is as follows:

"The People of the State of California, represented in Senate and Assembly, do *enact* as follows:

"Section 1. Section twelve hundred and seventeen of an act entitled 'An Act to establish a Penal Code,' approved February fourteenth, eighteen hundred and seventy-two, is hereby amended *so as to read* as follows: * * *" and so on as to each section amended and supplanted.

This proposition in the case is conceded by *all* of the three opinions filed in the State Supreme Court, after the point had there been raised. (Rec., p. 83, fols. 249 to 252; p. 91; p. 112, fol. 355; p. 117, fol. 351.)

The authorities in support of *this* proposition are the following, viz: Billings *v.* Harvey, 6 Cal. 383; Const. of Cal., Art. IV, Sec. 24; Treadwell *v.* Yolo Co., 62 Cal. 564; Billings *v.* Hall, 7 Cal. 1; Morton *v.* Folger, 15 Cal. 284; Clarke *v.* Huber, 25 Cal. 596; Bensley *v.* Ellis, 39 Cal. 313; Com. *v.* Marshall, 11 Pick. 350; Butler *v.* Palmer, 1 Hill, 330; Hartung *v.* People, 22 N. Y. 97; Hartung *v.* People, 26 N. Y. 167; Shepherd *v.* People, 25 N. Y. 406; People *v.* Nolan, 115 N. Y. 660; In re Medley, 134 U. S. 160; State *v.* McDonald, 20 Minn. 137; Wilson *v.* O. & M. R. W. Co., 64 Ill. 545; Matthew Hale's Hist. of the Pleas of The Crown, Vol. 1, p. 291; Miller's Case, 1 Wm. Bl. 451;

Rex *v.* McKenzie, Russ & Ry. 429; The Queen *v.* Inhab. of M., 8 Adol. & Ellis, 496; Same *v.* Inhab. of D., 14 Eng. L. & Eq., 124; Surtees *v.* Ellison, 9 Barn. & Cres. 750; U. S. *v.* Passmore, 4 Dall. 372; S. C. 1 Wash., Cir. Ct. R. 84; Com. *v.* Duane, (Pa.) 1 Binney, 601; Yeaton *v.* U. S., 5 Cranch, 281; Schooner R. *v.* U. S., 6 Cranch, 329; Com. *v.* Kimball, 21 Pick. 373; Key *v.* Gordon, 4 Moore & Payne, 341–350.

The contention made in the State Court, that the amendments of 1891 were *ex post facto* as to plaintiff in error, is also conceded by *all* of the three opinions filed in the State Supreme Court, after the point had been raised there. (Rec., p. 82, fol. 245; p. 83, fol. 249, p. 91, fol. 273 to p. 110, fol. 329; p. 112, fol. 335.)

The authorities in support of *this* proposition are the following, viz: Penal Code of Cal., Sec. 673; Cooley's Const. L. (5th ed.), p. 392; Blks. Com., Book 4, p. 350; Story on Const., Secs. 1769, 1779, 1781, 1791; Ex parte Arras, 78 Cal. 304; Ex parte Wadleigh, 82 Cal. 519; Ex parte Kelley, 65 Cal. 154; Ex parte Bernert, 62 Cal. 530; Const. U. S., Art. I., Secs. 10, 9; Caldor *v.* Bull, 3 Dallas, 386; Fletcher *v.* Peck, 6 Cranch, 87; Watson *v.* Mercer, 8 Peters, 109; Ogden *v.* Saunders, 12 Wheaton, 266; Cummings *v.* State of Mo., 4 Wall. 277; Ex parte Garland, 4 Wall. 333; Hartung *v.* People, 22 N. Y. 97; Hartung *v.* People, 26 N. Y. 167, 188; Shepherd *v.* People, 25 N. Y. 406; Davis *v.* Pierce, 7 Minn. 17; People *v.* Nolan, 115 N. Y. 660; In re Medley, 134 U. S. 160; State *v.* McDonald, 20 Minn. 137; Wilson *v.* O. & M. Red. Co., 64 Ill. 545.

Since, therefore, in the very opinion of the State Court here under review, as well as in two other opinions filed herein in said Court, it is conceded that the amendments of 1891 absolutely repealed the pre-existing law, and that such amendments are, as to the plaintiff in error, *ex post facto*, and therefore, as to him, in conflict with the Constitution of the United States, further discussion upon *this* assignment

of error would be useless, and we submit the same upon such opinions and the authorities above cited.

Second Assignment of Error.

"That, as shown by the facts set forth in the record and in the first assignment of error herein, the provisions of Section 187 of the Penal Code of California, approved March 28th, 1874, and also of Sections 1217 to 1229 of said Code, approved February 14th, 1872, have been repealed, *without any saving clause*, and cannot be enforced against said McNulty in the execution of the judgment and sentence in the case; and the Supreme Court of the State of California erred in its judgment, ordering said McNulty executed under such *repealed* Statutes." (Rec., 130.)

The arguments advanced herein, in support of the *first* assignment of error, apply equally to this assignment and are here referred to.

Third Assignment of Error.

"That the provisions of the Act of March 31st, 1891, Statutes of California, 1890–91, p. 272, have so changed and added to the punishment of said McNulty, as to make said statute an *ex post facto* law as to said McNulty and his alleged crime, and in contravention of the following provisions of the Constitution of the United States, to wit:

Art. I, Sec. 9. "No bill of attainder or *ex post facto* law shall be passed."

Art. I, Sec. 10. "No State shall pass any bill of attainder or *ex post facto* law," etc.

"Therefore, the Supreme Court of the State of California erred in its judgment ordering the execution of said McNulty." (Rec., 130.)

The arguments advanced herein, in support of the *first* assignment of error, apply equally to this assignment.

Fourth Assignment of Error.

"That by reason of the passage by the Legislature of the State of California, and the approval of the Act of March 31st, 1891, Statutes of California, 1890–91, p. 272, the only laws under which the judgment of conviction and sentence

pronounced against said McNulty could be executed were absolutely and completely repealed and abrogated. In consequence of which repeal and abrogation there was not, at the time the judgment of the Supreme Court of the State of California was rendered, nor is there now, any law of said state which authorizes or permits the execution of said judgment; and its execution would be in direct violation and contravention of the following provisions of the Constitution of the United States, to wit:

"Art. V of the Amendments thereof, which provides that no person shall be deprived of his life, liberty, or property, without due process of law.

"Art. XIV, Sec. 1, of the Amendments thereof, which provides as follows, viz: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' Therefore, the Supreme Court of the State of California erred in ordering by its judgment that said McNulty should be executed under said judgment." (Rec., 131.)

The arguments advanced herein, in support of the *first* assignment of error, apply equally to this assignment.

Fifth Assignment of Error.

"That the Supreme Court of the State of California erred in its decision that the judgment against said McNulty could be executed by the Sheriff of the City and County of San Francisco." (Rec., 132.)

The law, as it existed prior to the amendments of 1891, had been absolutely repealed by those amendments. (Rec., p. 117, fols. 351–355; p. 92, fols. 275–296; p. 82, fol. 245; p. 83, fol. 249; p. 84, fol. 251.) The California Court seems, in its final opinion, (Rec., 111) to have reasoned in this way, viz: That the amendments of 1891 absolutely repealed the pre-existing law, *but*, as, "under the authority of the recent decision of the Supreme Court of the United States in Ex parte Medley, 134 U. S. Rep. 160, the change

made by said amendments in the punishment was so material as to render it, as against appellant, [plaintiff in error] *ex post facto* and void, *under the constitution of the United States*," they could not be held to operate upon McNulty's case; therefore, since, *by reason of the U. S. Constitution*, he could not be executed under such amendments, the old law must be invoked, under the forced assumption that Sec. 329 of the Political Code of California operated as a saving clause to the amendments. In the argument of the learned Judge, wherein this assumption is made (Rec., p. 113, fols. 339–351) false premises are taken; the fact that the penalty and *punishment*, prescribed by the statute for murder, *were not altered* in the slightest degree by the amendments of 1891, seems to have been entirely overlooked; that *those* amendments *only related* to the *modus operandi* of enforcing the penalty prescribed elsewhere and in the Penal Code, was not stated as one of the premises of the argument.

The section of the Political Code above alluded to reads as follows, viz:

"The repeal of any law *creating* a criminal offense does not constitute a bar to the indictment or information and punishment of *an act* already *committed in violation of the law so repealed*, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act." (Pol. Code of Cal., Sec. 329.)

The laws repealed by the amendments of 1891 did not, in any manner, either *create* or define the crime of murder, neither did they create the punishment of such crime, as is assumed by the learned Judge; such laws merely prescribed *how* the prescribed punishment for such crime should be carried out; *i. e.*, they prescribed the *machinery* for, or *modus operandi* of, carrying out and inflicting such punishment. The definition of the crime of murder is found in Sec. 187 of the Penal Code of California, which section reads as follows, viz: "Murder is the unlawful killing of a human

being, with malice aforethought." Section 189 of said Penal Code defines the *degrees* of murder, and reads as follows, viz: "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate, arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degreee." The *punishment* for murder is prescribed by Section 190 of the said Penal Code, which reads as follows, viz: "Every person guilty of murder in the first degree shall suffer death, or confinement in the State prison for life, at the discretion of the jury trying the same; or upon a plea of guilty, the Court shall determine the same: and every person guilty of murder in the second degree is punishable by inprisonment in the State prison not less than ten years."

Thus it will be seen that the laws repealed by the amendments of 1891 were *not* the laws which denounced the *acts* constituting the crime of murder, nor were they the laws which affixed the penalties to such acts; consequently they could not, under the learned Judge's own argument, be the laws which created or defined the crime of murder.

Again, the provision of Section 329 of the said Political Code is, that the repeal of a law *creating* a criminal offense shall not be a bar to the prosecution and punishment of *an act committed in violation of the law repealed.* The *law repealed* by the amendments of 1891 did *not* in any manner provide either for the prosecution or *punishment of any act*, consequently no act could have been committed *in violation of its provisions.* It provided *solely* for the machinery by which ministerial officers could execute denunciatory and penal laws.

This being so, the old law being repealed, and the new law prescribing no mode for executing the penalty incurred upon offenders prior to such new law, the execution of the plaintiff in error, in accordance with the judgment here being

reviewed, would be to deprive such plaintiff in error of his natural rights, secured to him by the constitution of the United States, and to deprive him of his life without due or any process of law.

In coming to the conclusion that they did, in reference to the effect of Sec. 329 of the Pol. Code of Cal., the Supreme Court of that state did *more* than to merely consider the provissions of that Section ; they considered in *connection with* that Section the provisions of the Constitution of the United States (Rec., 112, fol. 335), and in so doing, the conclusion arrived at was the result of considering *jointly* the State Statute and the Federal Constitution, consequently it was a conclusion based upon the effect of such Federal Const., and, therefore, should be reviewed by this Court, if erroneous.

The State Supreme Court, in the opinion here being reviewed, determined as follows, viz :

That the new law repealed the old ; that the new law is *ex post facto ;* that, being *ex post facto*, the Constitution of the United States will not permit McNulty's execution under it ; therefore, he must be executed under the old law, because of Section 329 of the Political Code. In other words, if it were not for the provisions of the United States Constitution, he could be executed under the new law, but *because of those provisions*, Section 329 of the Political Code operates as a saving clause.

The arguments advanced in support of the *first* assignment of error herein apply equally to this assignment.

Sixth Assignment of Error.

"That the Supreme Court of the State of California erred in its decision that the judgment against said McNulty could be executed in the County Jail of the City and County of San Francisco." (Rec., 132.)

The arguments advanced herein, in support of the *first* and *fifth* assignments of error, apply equally to this assignment.

Seventh Assignment of Error.

"That the Supreme Court of the State of California erred in its decision that the judgment against said McNulty could be executed at all." (Rec., 132.)

The arguments advanced herein, in support of the *first* and *fifth* assignments of error, apply equally to this assignment.

Eighth Assignment of Error.

"That the Supreme Court of the State of California erred in not deciding that said McNulty should be discharged from custody, and in not ordering his discharge therefrom." (Rec., 132.)

The arguments advanced herein, in support of the *first* and *fifth* assignments of error, apply equally to this assignment.

Ninth Assignment of Error.

"That the Supreme Court of the State of California erred in its decision that said McNulty was not held in custody in violation of the laws and Constitution of the United States." (Rec., 132.)

The arguments advanced herein, in support of the *first* and *fifth* assignments of error, apply equally to this assignment.

Tenth Assignment of Error.

"That the Supreme Court of the State of California erred in not ordering the discharge from custody of said McNulty, and in ordering his execution under the judgment rendered against him, the record showing that his detention and imprisonment under said judgment was illegal, and without any authority of law or justification, and in violation of the Constitution and laws of the United States." (Rec., 132.)

The arguments advanced herein, in support of the *first* and *fifth* assignments of error, apply equally to this assignment.

Eleventh Assignment of Error.

"That the order made by the Supreme Court of the State of California, in its final judgment against said McNulty,

was made without any authority of law, and is therefore void." (Rec., 133.)

This assignment is supported by the arguments already advanced herein.

Twelfth Assignment of Error.

"That the Statutes of the State of California, which formerly authorized the making and rendering of the judgment pronounced against said McNulty, to wit: Sections 1217 to 1230, inclusive, of the Penal Code of the State of California, were absolutely repealed and abrogated by an act of the Legislature of the State of California, entitled "An Act to amend sections twelve hundred and seventeen, twelve hundred and twenty, twelve hundred and twenty-one, twelve hundred and twenty-three, twelve hundred and twenty-four, twelve hundred and twenty-five, twelve hundred and twenty-six, twelve hundred and twenty-seven, twelve hundred and twenty-nine, and twelve hundred and thirty of an act entitled 'An Act to establish a Penal Code,' approved February 14th, 1872, relative to execution of judgments of death," Approved March 31st, 1891. By reason whereof, said McNulty claims that the said judgment rendered against him, and affirmed by the Supreme Court of the State of California, was so affirmed without any authority of law whatever, and that, if executed thereunder, he will be deprived of his life and liberty without due process of law, and in violation of and contrary to the provisions of the 5th and 14th Articles of Amendment of the Constitution of the United States, as well as the Constitution of the State of California, and as a consequence the said judgment of affirmance was error." (Rec., 133.)

This assignment is supported by the arguments already advanced herein, especially by those set forth in support of the *fifth* assignment of error herein.

Thirteenth Assignment of Error.

"That there is no law of the State of California now, nor was there any such at the date of the making of the judgment and order appealed from, authorizing the detention or imprisonment of persons convicted of murder in the first

degree and sentenced to death, other than that mentioned in the 12th assignment of error herein. That the only punishment provided by the laws of the State of California, other than the one mentioned in said assignment of error, is imprisonment in the State prison for life. That, in consequence of said facts, said McNulty claims that said decision and judgment of said Supreme Court of the State of California is an attempt on the part of said State to deprive him of his liberty without due or any process of law, and contrary to the provisions of the Constitution of the United States; and if executed thereunder that he will be deprived of his life without due or any process of law, and contrary to the provisions of said Constitution. (Rec., 133.)

This assignment is supported by the arguments already advanced herein, especially by those set forth in support of the *fifth* assignment of error herein.

Fourteenth Assignment of Error.

"That the Supreme Court of the State of California had no jurisdiction, authority or power to render the decision and judgment which it did render, for the reasons stated in the dissenting opinion of Justices Harrison, De Haven and Garoutte, filed in said action on the 12th day of December, 1891, in said Court, and contained in the record herein." (Rec., 134.)

The arguments advanced herein, in support of the *first* and *fifth* assignments of error, apply equally to this assignment.

Fifteenth Assignment of Error.

"That the Supreme Court of the State of California had no jurisdiction, authority or power to render the decision and judgment which it did render, for the reasons stated in the opinion of said Court, written by Chief Justice Beatty, filed in said action on the 12th day of December, 1891, in said Court, and contained in the record herein." (Rec., 134.)

The arguments advanced herein, in support of the *first* and *fifth* assignments of error, apply equally to this assignment.

Sixteenth Assignment of Error.

"That it appears upon the face of the judgment in said cause, and in the record herein, that said McNulty has never been legally or otherwise indicted or presented by any Grand Jury, and that he has been proceeded against by information made and filed by the District Attorney of the City and County of San Francisco; and it does not appear by said judgment or by said record prior to the filing of such information, he had had a legal or any examination before, or that he had been legally or at all committed by any magistrate. On the contrary, such information was filed without any legal examination and commitment, and without any examination and commitment at all by any magistrate." (Rec., 134.)

This assignment of error is based upon the dissenting opinion of this Court, in the case of Hurtado *v.* California, 110 U. S. Reports, p. 538. It is also supported by the prevailing opinion in that case, for the proceedings which, under the Constitution of the State of California, form a *condition precedent* to the right to *prosecute by information* instead of indictment, were not had. See also assignments of error Nos. 17 and 18.

Seventeenth Assignment of Error.

"That the proceedings, as well as the laws and Constitution of the State of California, attempting to authorize them, and the verdict of the jury, are in conflict with and prohibited by the 5th and 14th Articles of Amendment of the Constitution of the United States, and are therefore void." (Rec., 135.)

The arguments advanced herein, in support of the *sixteenth* assignment of error, apply equally to this assignment.

Eighteenth Assignment of Error.

"That said McNulty was held to answer for the crime of murder, charged by the information in said action against him by the District Attorney of the city and county of San Francisco, and was tried and found guilty of said crime without any presentment or indictment of any Grand or other

Jury, and that the judgment rendered upon the said verdict in such case was and is void, and, if executed, will deprive said McNulty of his life and liberty without due process of law." (Rec., 135.)

The arguments advanced herein, in support of the *sixteenth* assignment of error, apply equally to this assignment.

Nineteenth Assignment of Error.

"There is error also in this, to wit: that the final judgment and decision of the Supreme Court of the State of California, in said action, affirmed the judgment of the lower Court of said State, and directed said lower Court to proceed in said action according to the opinion of said Supreme Court, as expressed in said final decision and affirmance; whereas, by the law of the land and the Constitution of the United States, the said decision and judgment of said Supreme Court ought to have been given for the said McNulty, and in accordance with the dissenting opinion filed in said action on the 12th day of December, 1891, and contained in the record in said action." (Rec., 135.)

The arguments advanced herein, in support of the *first* and *fifth* assignments of error, apply equally to this assignment.

Twentieth Assignment of Error.

"The Supreme Court of the State of California erred in not ordering and directing the discharge of said John McNulty from custod.y" (Rec., 136.)

This assignment is supported by the arguments already advanced herein.

Twenty-first Assignment of Error.

"The Supreme Court of the State of California erred in not reversing the judgment which had been taken by appeal to said Court from the Superior Court of said State by said John McNulty." (Rec., 136.)

This assignment is supported by the arguments already advanced herein.

Twenty-second Assignment of Error.

"That the Sheriff of the City and County of San Francisco had no authority to confine or detain in custody or under arrest the said John McNulty." (Rec., 136.)

This assignment is supported by the arguments already advanced herein.

Plaintiff in error refers, in support of each and every of the assignments of error herein, to the dissenting opinion of Justice Harrison, filed in the Supreme Court of California, and which is set forth in full in the Record herein (Rec., 91), which decision shows, not only that the Federal questions presented herein were fully considered by the State Court, but that such questions entered into and became not only a part of, but the foundation of, the judgment of said Court, in coming to the conclusion which was finally reached in the case; and that it was *on account* of these questions that said Court felt compelled to assume that the judgment could be executed under the Political Code Section invoked.

From the foregoing, it will be seen that the defendant in error is attempting and threatening to take the life of the plaintiff in error, in a case where there is no provision of law authorizing the execution of the judgment rendered against him. The judgment here under review is the same as though the State Court had adjudged that the plaintiff in error, having been convicted of manslaughter, the penalty for which crime is imprisonment for ten years, could be imprisoned for ten years and then hanged, the Court supplying to the Statute such latter penalty. Respectfully submitted,

CARROLL COOK,

For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
MAY 15 1893
JAMES H. McKENNEY,
CLERK.

No. 1,253.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

JOHN McNULTY, PLAINTIFF IN ERROR.

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief in Reply to Brief of Defendant in Error on Motion to Dismiss and Motion to Affirm.

CARROLL COOK,
Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 1253—OCTOBER TERM, 1892.

JOHN McNULTY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

IN ERROR OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Preliminary Addition to Brief of Defendant in Error, on Motion to Dismiss and Motion to Affirm.

In addition to what hereinafter follows, the plaintiff in error presents, for the consideration of the Court, the following reply to the motion to dismiss, made by the defendant in error and the brief filed in support of such motion. If these preliminary suggestions and objections to the granting of said motion are well founded, it will not be necessary for the Court to go farther, or consider what is contained in the main portion of this brief, the same being addressed, more to the *merits of the case*, than to the merits of *the motion* now made by the defendant in error. To *my* mind, these preliminary suggestions must certainly cause the overruling of said motion. The objections and arguments which I would *here* make, are as follows, viz :

I.

The motion in no way conforms to the rules of this Court. Rule 6, sub-division 1, reads : "All motions to the Court shall be reduced to writing and shall *contain* a brief *statement of the facts* and objects of the motion." The motion filed in this case (Filed Apr. 11, 1893) contains no part of the record, nor is there contained therein any statement of facts which can enable the Court to act understandingly. This defect has repeatedly been held fatal by this Court. (*Tex. Land & Cattle Co.* vs. *Scott*, 137 U. S., 436 ; *City of Waterville* vs. *Van Slyke*, 115 U. S., 290; *Mayer* vs. *Walsh*, 108 U. S., 17). It is absolutely impossible to ascertain from said motion what portion or portions of the record the defendant in error relies upon to support his said motion.

The motion to affirm,—united with said motion to dismiss,—under the provisions of sub-division 5 of Rule 6 of this Court, is likewise devoid of any specifications, whereby the Court can be enabled to act understandingly. It is merely the *unsupported assertion* of the Attorney-General of the State of California that the writ of error was taken for delay only. There is nothing referred to in the record to support such assertion and the facts before the Court show it to be an unfounded assertion. Why, if for delay only, should counsel for plaintiff in error

travel three thousand miles to be in attendance at the mere making of said motion? The record shows that human life is at stake and that questions of vital importance are involved herein. The entire proceedings in the case show that it is not delay, but justice, that the plaintiff in error seeks, while the tardiness of the *defendant in error*, in making said motion—from Dec. 6, 1892, to Apr. 11, 1893—shows that the People of the State of California have sought delay, rather than the plaintiff in error, or that they had but little faith in the efficacy of said motion.

The motion to affirm is *not* based upon (see written motion, filed Apr. 11, 1893) the ground *last* specified in sub-division 5 of Rule 6 of the Court, *i. e.* upon the frivolousness of the question upon which jurisdiction depends, therefore, I will not take time nor space to show the contrary.

II.

The *only* question presented by said motion, if, in view of what is contained in paragraph 1 of these preliminary objections, the motion can be entertained at all, is, whether any Federal question *was involved*, not whether it was correctly or incorrectly decided by the State Court.

In *three* decisions in the case, rendered by the State Court, which are to be found in the record, (Rec. pp. 70, 91, & 111) it will be seen that *two* of them *directly* passed upon a Federal question and that the third *considered* such Federal question in arriving at the conclusion reached, while two of the Justices of said State Court (Rec. p. 91, fol. 273; p. 110, fol. 329; p. 111, fol. 332 & p. 119, fol. 357) still dissented, standing by their original opinion that the plaintiff in error should be ordered released from custody *by reason of the provisions of the Constitution of the United States*. Does this not show that a Federal question was *involved?*

But, for the purposes of this motion, the Court need go no further than to read the *stipulation* filed herein, whereby it unequivocally appears that *Federal questions were involved* and considered, in the lower Court. Whether rightly or wrongly, on this motion, this Court has no occasion to pass. If this Court should, on this motion, decide them not proper to have been considered, it, by its decision, would decide *that they were considered*, therefore, as the motion is based upon the grouud that no Federal question was involved, it would, by sustaining the motion, do so in violation of its own finding.

The *stipulation* above referred to and which is on file herein, with the Clerk of this Court, reads as follows, viz:

"Supreme Court of the United States.

No. 1253—OCTOBER TERM, 1892.

JOHN McNULTY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

It is hereby stipulated and agreed, by and between the counsel in the above entitled cause, that, on the argument of this cause before the

Supreme Court of the State of California, all of the points contained in the 22 assignments of error in the record herein (Rec. p. 128 to 136), were called to the attention of said Court and presented by argument *for its consideration*, prior to the rendering, by said Court, of the judgment here under review.

Dated, Washington, D. C. May 1st, 1893.

CARROLL COOK,
For Plaintiff in Error.

WM. H. H. HART,
Attorney General of California, for Defendant in Error."

What more than the foregoing stipulation and the dissenting opinion of Justice Harrisou (Rec. p. 91), (still maintained at the time of the *final* decision of the State Court,) can be required to demonstrate that Federal questions were not only presented and involved, but were considered and passed upon by the State Court, in rendering the judgment here under review?

If correct in this position, there will be no necessity for the Court to read what follows herein. I present it however, that it may be before the Court, should these preliminary suggestions not find weight in the opinion of the Court. If such subsequent matter *be* considered I ask that the Court also consider with it and as a part of it, the following decisions rendered in this Court on May 1, 1893, viz.:

Mexican Cent. R. R. Co. vs. *Pinkney*, and *B. & O. R. R. Co.* vs. *Bough.*

Respectfully submitted,

CARROLL COOK,
For Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

JOHN McNULTY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief in Reply to Brief of Defendant in Error on Motion to Dismiss and Motion to Affirm.

The first reply to be made to the brief of defendant in error filed on motion to dismiss, is that neither said brief nor said motion should be considered by the Court, for the reason that said brief was not served, nor was said motion made in accordance with the rules of said Court. The rules of this Court require (Rule 6, Sub. 4) that upon a motion to dismiss, before the same can be entertained by the Court, notice of the motion, accompanied by the brief of the moving party upon the motion, shall be served upon the adverse party, if he resides West of the Rocky Mountains, at least thirty days before the time fixed in the notice for submitting the motion. The notice in this case fixes May 1, 1893, as the day for hearing. The plaintiff in error resides in San Francisco, Cal. The notice was served on March 30, 1893, but *no brief accompanied it*, nor was any brief on such motion served until on or about April 12, 1893. If, therefore, Rule 6 of this Court is to be considered as governing the practice of the Court, said motion ought not, in our opinion, to be considered by the Court for any purpose.

If, however, this Court should see fit to entertain said motion and not to enforce said rule, then a reply to said brief should be made by plaintiff in error, which reply he makes as follows :

The brief filed by the Attorney General of California, in support of the motion to dismiss, does not fully and fairly state the facts of the case, and, before proceeding to suggest matters in answer thereto, it will be as well to point out some of the incorrect statements of fact contained therein. The statement upon page 1 of said brief, that the judgment here under review "was made on the ground that the law which was in force at the time he [plaintiff in error] was convicted and sentenced to be executed remained in force," etc., only *partially* states the facts. By reading *all* of the decisions rendered in the case by the California Supreme Court, and especially that portion of the final decision of that Court, commencing at p. 112 of the record, at folio 335, and that portion on p. 119 thereof which commences at folio 355, it will be seen that the State Court gave to Section 329 of the Political Code of California, the

construction which they did, *because* the amendments of 1891 would violate Article I, Section 10 of the Constitution of the United States if *enforced as they read*. Consequently, the statement of the Attorney General, made at the bottom of page 1 of his said brief, that "the decision of the Court, which the plaintiff in error seeks to have reviewed, related entirely to the question whether a certain statute of that State had been repealed, and not to any Federal question," is *not* the fact.

The general statement made by the Attorney General at the bottom of page 1 and the commencement of page 2 of his said brief, that counsel does not point out, in the brief filed on the main case by plaintiff in error, what particular question was decided by the State Court, nor under what particular provision of the laws of Congress it is claimed this Court has jurisdiction in this case, we consider answered by the assignments of error in the Record (Record, 128 to 136). We shall, however, more fully specify such matters herein.

The Attorney General, throughout the entire *first* point of his brief, seems to have wholly mistaken the position assumed by the plaintiff in error. He argues that, as the State Court did *not* order the execution under the *ex post facto* law complained of, therefore, this Court has nothing to do with the case. (End of point 1, p. 3, of Defendant's Brief on Motion to Dismiss.) Plaintiff in error does not pretend to claim that the judgment under review undertakes to order his execution under an *ex post facto* law. What we claim is that the amendments of 1891 were *ex post facto*, as decided by the State Court itself; that such amendments, according to their wording, applied to *all* cases, *past* as well as *future*; that, therefore, such amendments could *not* be enforced, as against plaintiff in error; that such amendments *repealed* the "old law" and left *no* law under which plaintiff could be executed (as decided by the State Court), if attempted to be enforced *as they read*; and that, *because of their being in violation of the United States Constitution*, (Article I, Section 10), a section of the Political Code of the State, which by no kind of construction can be made to read as rendered by the State Court, must be invoked to authorize the *execution of the plaintiff in error under the repealed law*. In other words, that, since the "*new law*" cannot be enforced and since the "*old law*" has been repealed, the execution of the plaintiff in error would be *without any authority of law at all*, and consequently without due or any process of law, and in violation of his rights, in that respect, under the Constitution of the United States of America and the 14th amendment thereof. The Courts of a State, (the judicial Power of the State Government), have no more right to violate the provisions of the United States Constitution, than has the Legislature (the legislative Power of such State Government).

Now, in this case, the main contention of the plaintiff in error is, that no citizen of the United States, nor any foreigner under the protection of a treaty of the United States, can be deprived of his life without due process of law, either by the Government of the United States or by either of the several States which comprise and form a part of that Government or any of the Powers of such States, whether judicial, legislative or executive.

It is true, that in the earlier decisions of this Court, commencing with the case of *Barron* vs. *City of Baltimore* (7 Peters, 243), there was formulated a rule of construction for the amendments to the Federal Consti-

tution, leading to the result that the first eight, containing general guaranties of civil and religious liberty and of protection to person and property, are limitations only upon the Federal power, and cannot be invoked as against an exercise of power by the States. This doctrine has been announced with reference to provisions as to jury trial in suits at common law (*Walker* vs. *Sauvinet*, 92 U. S., 90); as to criminal prosecutions in general (*Twitchell* vs. *Com.*, 7 Wall., 321); as to previous jeopardy (*Fox* vs. *Ohio*, 5 How., 410); as to cruel and unusual punishments (*Pervear* vs. *Com.*, 5 Wall., 475; *In re* Kemmler, 136 U. S., 436); as to issuing warrants only on probable cause supported by oath (*Smith* vs. *Maryland*, 18 How., 71); as to the right to peaceably assemble (*United States* vs. *Cruikshank*, 92 U. S., 542); and as to the right to bear arms (*Presser* vs. *Illinois*, 116 U. S., 252).

"Notwithstanding these decisions," says Emlin McClain, of the Law Department of the State University of Iowa, in Vol. VI, No. 8 of the Harvard Law Review, "constant efforts have been made to break down the doctrine, and these efforts have finally received encouragement from members of the Court. In the case involving the right to bear arms (*Presser* vs. *Illinois*, 116 U. S., 252), and again in the Anarchists' case (*Spies* vs. *Illinois*, 123 U. S., 131), counsel very strongly insisted that the rights, privileges and immunities protected by the first eight amendments against Federal interference, constitute the privileges and immunities of citizens of the United States, which the States are, by the fourteenth amendment, forbidden to abridge.

In the Anarchists' case the Court, after re-affirming the doctrine that the eight amendments are only limitations on Federal power, *recognizes the point urged under the fourteenth amendment*, but, after an elaborate consideration of the statutes of Illinois and the evidence presented by the record, comes to the conclusion that there was nothing in the case to raise the question as to whether that amendment preserves to the citizen, as against his State, the privileges and immunities enumerated in the eight amendments. The question so elaborately and forcibly argued, to the effect that these privileges and immunities are by the fourteenth amendment protected against State action, was, therefore, not passed upon by the Court.

In the Kemmler case (136 U. S., 436), the question being whether the statute of New York, providing for execution by electricity, was unconstitutional, as in violation of the eighth amendment of the Federal Constitution, forbidding cruel and unusual punishments, or the 'privileges and immunities' or 'due process of law' clauses of the fourteenth amendment, the Court held that the eighth amendment was not applicable to the States. * * * But it is evident that the Court felt that the punishment of death by electricity was not a 'cruel and unusual' punishment in cases where capital punishment is proper.

In view of the fact that the question as to whether the privileges and immunities guaranteed in the eight amendments as against Federal infringement, constitute privileges and immunities which the States are, by the fourteenth amendment, forbidden to abridge, has thus not seemed to have attracted the attention of the Court in previous cases as being vital, it is, perhaps, not surprising that in a recent case it should have occasioned a most serious division. In *O'Neil* vs. *Vermont* (144 U. S., 323), decided in April, 1892, the question was, whether a conviction in Vermont for violation of the laws of that State with reference to the sale of

intoxicating liquors by shipping the same into the State by express to fill orders for private consumers, and a sentence (in accordance with special provisions of the State law) for repeated violations charged in one count, which would involve payment of fines to the amount of over six thousand dollars, or, on default, confinement at hard labor for over fifty-four years, infringed any provisions of the Federal Constitution. In the opinion of a majority of the Court, no Federal question appeared on the record ; but three Judges were of the opinion that it sufficiently appeared that the defendant in the State Court claimed the protection of the commerce clause, and also of the provision against cruel and unusual punishments ; and these three Judges held that *not only* as to the commerce clause, but *also as to the clause relating to punishments*, the *decision of the State Court* denied and abridged the privileges and immunities of defendant under the Federal Constitution, and was in violation of the law of the land.

Here, then, with three Judges insisting that the fourteenth amendment extends the protection of the Federal Constitution, as against State action, to the privileges and immunities which by the first eight amendments were originally secured by that charter only as against Federal abridgment, and *the other six Judges expressing no opinion on that question*, but *only* claiming that the case did not call for any expression of view in reference thereto, there is a controversy of far-reaching importance."

When this question does come squarely before the Court, as we consider it does in this case, the adoption by this Court of the doctrine contended for by counsel in the Spies and Presser cases, and accepted by the dissenting Judges in the O'Neil case, as well as by Justice Harlan in his dissenting opinion filed in the Hurtado case (110 U. S., 516), wherein Justice Field took no part, would, undoubtedly, overrule some previously decided cases, but would accord with the trend of opinion as expressed by Justices of the Court in such recent cases. The cases in which the former doctrine of the Court, respecting the effect of the eight amendments prior to the adoption of the fourteenth amendment, has been recognized as applicable since the adoption of that amendment, would of course be overruled. But these cases are few, and in some, if not in all of them, the objection now made, under the fourteenth amendment, was not considered.

No clearer or more forcible argument can be advanced, in support of the contention that the fourteenth amendment gives to every citizen Federal protection from infringement by State authority, whether legislative, executive or judicial, of the privileges and immunities granted by the Federal Constitution, than is to be found in the dissenting opinions of Justices Field, Harlan and Brewer, filed in the O'Neil case (144 U. S., 323 ; 12 Sup. Court Reporter, p. 707.)

Inequality of rights has been the cause of all the disturbances, insurrections and civil wars that ever happened in any country, in any age of mankind. It was the cause of the American Revolution, when the English parliament sat itself up to bind America in all cases whatsoever, and to reduce her to unconditional submission. It was the cause of the French Revolution ; and also of the civil wars of England, in the time of Charles and Cromwell, when the House of Commons voted the House of Lords useless. The United States of America is a Nation, and it is the fundamental principle of that government that all of its citizens shall have the equal protection of the laws, and shall enjoy equal privileges and immunities ; and, to secure such, the fourteenth amendment of its Constitution was adopted by its citizens.

America has the high honor and happiness of being the first nation that gave to the world the example of forming written constitutions, by conventions elected expressly for the purpose, and of improving them by the same procedure, as time and experience should show necessary. As so well said by Justice Field, in speaking of the Federal Constitution : "It neither changes with time, nor does it in theory bend to the force of circumstances. While it stands, it is the law for rulers and people, equally in peace and in war, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Upon the question of the effect of the fourteenth amendment of the Federal Constitution, I borrow from an argument of one of the ablest lawyers upon the Pacific Coast, who has recently passed from our midst and joined the great majority—Hon. Creed Haymond—the following :

"I am not here to claim, nor, indeed, is it necessary to do so, that the men who framed the fourteenth amendment to the Federal Constitution, at that moment thought how far-reaching in its effect it was to be, or how great and important were the rights which in the future it would secure to this people. That they builded wiser than they knew, may be conceded without detracting from their merits. The young men of the Colonies who met in Philadelphia, and in the enthusiasm of youth threw down the gage of battle to the greatest empire the world, up to that time, had ever seen, declared these truths to be self-evident : 'That all men are created equal ; that they are endowed by the Creator with certain inalienable rights, among these are life, liberty and the pursuit of happiness ; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed ; that when any form of government becomes destructive to these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.'

As long as the words of that declaration shall be remembered—as long as love of liberty and free institutions exist—as long as the government which these men launched upon the sea of empire continues, it must be held by Courts that all legislation, constitutional or otherwise, is to the end that these *inalienable rights shall be secured.* * * * The men who framed the Federal Constitution, and a great instrument it was, were looking back ; they were jealous as well as fearful of the power of a great central government, and left most of the securities to life, liberty and property to rest under the control of the States. A generation of statesmen which came after them, still jealous and fearful of that power, sought to limit it by narrow rules of construction, but the people of the United States never, at any time, participated in the fears which agitated the minds of men trained in those schools. The American people have looked forward to the accomplishment of a great destiny. Bold and brave, they have never feared that they could be harmed by anything of their own creation. At all times and under all circumstances, they have dared to venture upon unknown governmental policy. * * * Although the Declaration of Independence had declared the equality of all men before the law ; although the articles of confederation had proclaimed that the Government which was founded upon this principle was to endure forever ; although in the preamble to the Federal Constitution it had been said that Government was ordained *to secure* the great rights of

equality before the law ; yet the Federal Constitution protected slavery within the States, and its framers dared not wrest from the States power which might be wielded to destroy that equality before the law. At last, however, in the storm of battle, these great truths asserted themselves, and at the close of the Civil War were sanctioned by the thirteenth, fourteenth and fifteenth amendments to the Federal Constitution. By the thirteenth amendment, slavery and involuntary servitude of every kind, except as a punishment for crime, was abolished in every place belonging to the jurisdiction of the United States. By the fifteenth amendment the right of any State to deny or abridge the right of citizens to vote on account of race, color or previous condition of servitude, was denied. But in this series of amendments, the one with which we have especially to deal is the fourteenth, and principally with its first section, which declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens of the United States* and the State wherein they reside ; that no State shall make *or enforce* any law which shall abridge the privileges or immunities *of citizens of the United States*, nor shall any State *deprive any person of life*, liberty or property *without due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws.

Of the section in question, much has been said and much has been written. That section deals with two classes of rights, one of which may be classed as political and the other civil. * * * The first clause of the section was not a part of it as originally reported to the House of Representatives. This clause was an afterthought ; its object and purpose, or rather the reason which dictated it, was to avoid the effect of the decision of the Supreme Court of the United States in the Dred Scott case. * * * They (the thirteenth, fourteenth and fifteenth Amendments) were adopted to impose new restraints upon State sovereignty, at a time when State power had nearly succeeded in destroying the National sovereignty. Of the first ten and the last three amendments, says Cooley : 'It may be safely affirmed that the first ten take from the Union no power it ought ever to have exercised, and that the last three require of the States the surrender of no power which any free government should ever employ.' (Cooley's Prin. of Const. L., 192–202.) Again, Mr. Cooley, in his work on Constitutional Limitations (4 Edition, page 361), speaking of the amendment in question, says : 'A principle of State constitutional law has now been made a part of the Constitution of the United States.' * * * In the opinion of a majority of the Court, in the Slaughter Houses cases, is found the intimation upon which the whole argument of the other side is based ; and in answer to that case, and in answer to the opinion of a majority of the Court, it might be conclusive to say that the construction of the fourteenth amendment was not necessarily involved in it ; that the decision was based upon the police powers of the State, and not upon any construction of the fourteenth amendment. It has been said that history repeats itself, and no better illustration can be had of the truth of this saying than the contention in the present case. The Federal Constitution contains a provision which prevents any State from impairing the obligation of contracts. The occasion for the introduction of that clause is historical and in this presence need not be stated. In the Dartmouth College case it was contended that the amendment should be limited to cases which were within the immediate mischief which produced that amendment. It was argued in that case

that the framers of the Constitution did not have such a case as the Dartmouth College case in view. In answer to this argument, Mr. Justice Story said : 'It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the Constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent occurrence, to which the temptation was strong, and of which the mischief was more extensive, constituted the great motive for imposing the restriction on State Legislatures ; but although a particular and rare case may not in itself be of sufficient magnitude to induce a rule, yet it must be governed by the rule when established, unless some plain and strong reason for excluding it can be given.' * * * I want no better answer to the arguments, or rather the suggestions of counsel that have been made in this connection, than the answers of Chief Justice Marshall and of Justice Story in the Dartmouth College case. But if I needed more I might go back to Magna Charta. It was wrested by the Barons of England from the King. The occasion was that the Norman kings had destroyed almost all there was of Anglo-Saxon institutions and usages, and their power was felt, not by negroes in that country, but by the Barons, the feudal land owners ; they were the men who assembled and they were the men who secured Magna Charta. Let me ask this Court, who in England ever pretended to limit the great general principles there enunciated to the feudal holdings? The rights of the Barons to property were no more within the protection of that great charter than were the property rights of the humblest individual in that country. It is true that it in terms only protected the rights of freemen, but it is also true that in the course of time that qualification dropped out of the instrument itself, and that all classes of men, under all circumstances, found protection under the twenty-ninth section of Magna Charta. It was adopted in England ; it was a covenant with the Barons of that island ; yet what English jurist ever sought to limit the great principles which it enunciated to persons and property within the boundaries of England? Who has ever maintained in an English Court that it does not reach wherever the proud flag of that country floats, and does not protect life, liberty and property wherever her morning drum-beat is heard? Again, coming nearer to our own time, it was the Stamp Act which changed Coke's comments on the Magna Charta from dead law into living gospel. It converted the fundamental principles of law into the things of daily speech, and infused the spirit of Coke into a million of minds that never heard his name. It was the Stamp Act which precipitated the Revolution, and which caused the separation between England and her Colonies, but who, that has ever known of the conference between Jefferson and Dabney Carr and Patrick Henry, in the old tavern at Williamsburg, ever limited the resolutions which they, in the dead hours of the night, formulated for a Virginia Legislature, to a protest against stamped paper? The Stamp Act was the *occasion* of the Declaration of Independence, the incorporation of the great principles of Magna Charta and of Anglo-Saxon liberty into the fundamental laws of the country were the *consequences ;* and who, in interpreting the Federal Constitution, ever claimed that all its guaranties were to protect the people of this country against stamped paper?"

The Attorney General, in his brief upon this motion, seems to have overlooked the fact that the record herein shows that jurisdiction in this

case is claimed, because the State of California, through one of its executive officers, a Sheriff, is threatening, under orders of its judicial officers, to execute the plaintiff in error after the only law which authorized or provided for his execution has been repealed and wiped from the statute books. In other words, that the State of California, by its judicial power, is threatening to deprive the plaintiff in error of his life without any authority of law, and consequently without due or any process of law. (Articles V, IX and XIV of the Amendments to the U. S. Const.)

To live and enjoy the life given to him by his Creator is the inalienable right of every man in this Government, until *by some law of the country* he can be deprived of that right. It is not only one of the rights and immunities of every citizen, secured to him by the fourteenth, as well as the tenth amendment of the Federal Constitution, but where *no law exists* authorizing the taking of such life, to deprive him of it would be not only to deprive him of his life without authority of law, but it would also be to deprive him of his life without "due process of law," which is inhibited by the fifth and fourteenth amendments to the Federal Constitution. What the Legislature is forbidden to do by the provisions of the State Constitution, the State and its officers, judicial as well as legislative and executive, is forbidden to do by the fourteenth amendment of the Federal Constitution.

"The phrase *due process of law*," says Justice Harlan, in the dissenting opinion filed in the Hurtado case (110 U. S., 539), "is not new in the constitutional history of this country or of England. It antedates the establishment of our institutions. Those who had been driven from the mother country by oppression and persecution, brought with them as their inheritance, which no Government could rightfully impair or destroy, certain guaranties of the rights of life and liberty and property, which had long been deemed fundamental in Anglo-Saxon institutions. In the Congress of the Colonies held in New York in 1765, it was declared that the Colonies were entitled to all the essential rights, liberties, privileges and immunities confirmed by Magna Charta to the subjects of Great Britain. (Hutch. Hist. Mas. Bay, App. F.) 'It was under the consciousness' says Story, 'of the full possession of the rights, liberties and immunities of British subjects, that the colonists in almost all the early legislation of their respective assemblies insisted upon a declaratory act, acknowledging and confirming them.' (1 Story Const., Section 165.) In his speech in the House of Lords, on the doctrine of taxation without representation, Lord Chatham maintained that the inhabitants of the Colonies were entitled to all the rights and the peculiar privileges of Englishmen; that they were equally bound by the laws, and equally entitled to participate in the Constitution of England. On the 14th of October, 1774, the delegates from the several Colonies and Plantations, in Congress assembled, made a formal declaration of the rights to which their people were entitled by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts under which the Colonial Governments were organized. Among other things, they declared that their ancestors who first settled the Colonies were, at the time of their immigration, 'entitled to all the rights, liberties and immunities of free and natural born subjects within the realm of England;' that 'by such immigration they by no means forfeited, surrendered or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of

them as their local and other circumstances entitle them to exercise and enjoy ;' and that 'the respective colonists are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.' (1 Journal of Cong., 27–8–9.)

These declarations were subsequently emphasized in the most imposing manner, when the doctrines of the common law respecting the protection of the people in their lives, liberties and property, were incorporated into the earlier constitutions of the original States. Massachusetts, in its Constitution of 1780, and New Hampshire in 1784, declared in the same language, that 'no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers or *the law of the land ;*' Maryland and North Carolina in 1776, and South Carolina in 1778, that 'no freeman of this State be taken, or imprisoned, or disseized of his freehold, liberties or privileges, outlawed, exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or *the law of the land ;*' Virginia in 1776, that 'no man be deprived of his liberty, except *by the law of the land*, or the judgment of his peers ;' and Delaware in 1792, that no person 'shall be deprived of life, liberty or property, unless by the judgment of his peers or *the law of the land.*'

In the ordinance of 1789 for the government of the Northwestern Territory, it was made one of the articles of compact between the original States and the people and States to be formed out of that territory—'to remain forever unalterable, unless by common consent'—that 'no man shall be deprived of his life, liberty or property, but by the judgment of his peers or *the law of the land.*' These fundamental doctrines were subsequently incorporated into the Constitution of the United States. The people were not content with the provision in Section 2 of Article 3, that 'the trial of all crimes, except in cases of impeachment, shall be by jury.' They desired a fuller and broader enunciation of the fundamental principles of freedom, and therefore demanded that the guaranties of the rights of life, liberty and property which experience had proved to be essential to the safety and security of the people, should be placed beyond all danger of impairment or destruction by the general Government through legislation by Congress. They perceived no reason why, in respect of those rights, the same limitations should not be imposed upon the general Government that had been imposed upon the States by their own constitutions. Hence the prompt adoption of the original amendments, by the fifth of which it is, among other things, provided that 'no person shall be deprived of life, liberty or property *without due process of law.*' This language is similar to that of the clause of the fourteenth amendment now under examination. *That similarity was not accidental, but evinces a purpose to impose upon the States the same restrictions, in respect of proceedings involving life, liberty and property, which had been imposed upon the general Government.*

'Due process of law,' within the meaning of the National Constitution, does not import one thing with reference to the powers of the States, and another with reference to the powers of the general Government. If particular proceedings conducted under the authority of the general Government, and involving life, are prohibited, because not constituting that due process of law required by the fifth amendment of the Constitution

of the United States, similar proceedings, conducted under the authority of a State, must be deemed illegal as not being due process of law within the meaning of the fourteenth amendment. What, then, is the meaning of the words 'due process of law' in the latter amendment?

In seeking that meaning we are, fortunately, not left without authoritative directions as to the source, and the only source, from which the necessary information is to be obtained. In *Murray's Lessees* vs. *Hoboken, etc.*, (18 How., 272, 276–7), it was said: 'The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that *it was not left* to the legislative power to enact *any process* which might be devised. The article is a restraint on the legislative as well as on the executive *and judicial powers* of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of procedure existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.'

Magna Charta – upon which rested the rights, liberties and immunities of our ancestors—was called, said Coke, 'the Charter of the Liberties after the Kingdom, upon great reason, because *liberos facit*, it makes the people free.' Hallam characterizes the signing of it as the most important event in English history, and declares that the instrument is still the keystone of English liberty. 'To have produced it,' said Mackintosh, 'to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind.' By that instrument the king, representing the sovereignty of the nation, declared that 'no freeman shall be taken or imprisoned, or be disseized of his freehold or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we (not) pass upon him, nor condemn him, but by lawful judgment of his peers, or *by the law of the land*.'

'The words due process of law were undoubtedly intended,' said this Court, in *Murray's Lessees* vs. *Hoboken, etc.*, 'to convey the same meaning as the words "by the law of the land" in Magna Charta.' That the one is the equivalent of the other was recognized in *Davidson* vs. *New Orleans*, 96 U. S., 97. (See, also, 2 Kent., 13; 2 Story Const., § 1,789; Cooley's Const. Lim., 353; Pomeroy's Const. Law, § 245; *Greene* vs. *Briggs*, 1 Curtis, 325.) Whether the phrase in our American constitutions, National or State, be 'law of the land,' or 'due process of law,' it means in every case the same thing. (Cooley's Const. Lim., 352.) * * * *

Erskine, in his speech delivered in 1784, in defense of the Dean of St. Asaph, said, in the presence of the Judges of the King's bench: 'If a man were to commit a capital offense in the face of all the Judges of England, their united authority could not put him upon his trial; they could file no complaint against him, even upon the records of the Supreme Criminal Court, but could only commit him for safe custody,

which is equally competent to every common Justice of the Peace. The Grand Jury alone could arraign him, and in their discretion might likewise finally discharge him by throwing out the bill with the names of all your lordships as witnesses on the back of it.' That this defender of popular rights against official oppression was not in error when saying that no person could be arraigned for a capital offense except upon the presentment or indictment of a Grand Jury, is shown upon almost every page of the common law. * * * Almost the identical words of Magna Charta were incorporated into most of the State constitutions before the adoption of our National Constitution. When they declared, in substance, that no person should be deprived of life, liberty or property, except by the judgment of his peers or *the law of the land*, they intended to assert his right to the same guaranties that were given in the mother country by the great charter, and the laws passed in furtherance of its fundamental principles."

In the case of *Rowan* vs. *The State*; 30 Wis., 129, the Court, in defining the meaning of the words "due process of law," says: "These words do mean law in its regular course of administration, according to prescribed forms and in accordance with the general rules *for the protection* of individual rights."

In the prevailing opinion in the Hurtado case (110 U. S., 535) the Court uses the following language:

"Due process of law in the latter (the fifth amendment) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the fourteenth amendment, by parity of reason, it refers to that law of the land of each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of *those fundamental principles of liberty and justice which lie at the base of our civil and political institutions*, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."

Is it not *a fundamental principle of liberty and justice which lies at the base of our civil and political* institutions, that no man can be deprived of his life *unless there is a law authorizing the taking of it?* Would it not be a violation of such *fundamental principle* to take a man's life after the law authorizing such execution had been repealed? If so, then, under this decision of the Court, the defendant in error is threatening to take the life of the plaintiff in error in this case, without due or any process of law. (See brief of plaintiff in error upon the main case, Assignment No. V)

Again, in the Hurtado case (110 U. S., 535), the Court, in the prevailing opinion, says:

"But it is not to be supposed that these legislative powers are *absolute* and *despotic*, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. *It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power.* * * * Arbitrary power [of the Judiciary as well as the Legislature.—Cook] enforcing its edicts to the injury of the person and property of its subjects *is not law*, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the

action of the governments, both State and National, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities, to protect the rights of individuals and minorities, as well against the power of numbers, as *against the violence of public agents* [including State Judges.—COOK] *transcending the limits of* LAWFUL AUTHORITY, *even when acting in the name and wielding the force of government.*"

In the case of *Brown* vs. *Levee Comrs.* (50 Miss., 468), in defining the meaning of the term "due process of law," the Court says:

"It refers to certain *fundamental rights* which that system of jurisprudence, of which ours is a derivative, *has always recognized.* If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by 'due process of law.'"

In the case of *Loan Association* vs. *Topeka* (20 Wall., 655–662), this Court, Justice Miller writing the opinion, says:

"It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nevertheless a despotism."

It is said in Swift's Digest (Conn.), 17, that "no individual or body of men has a discretionary or arbitrary power to commit any person to prison; no man can be restrained of his liberty, be prevented from removing himself from place to place as he chooses, be compelled to go to a place contrary to his inclination, or be in any way imprisoned or confined, *unless by virtue of the express laws* of the land," certainly not when such laws have been by the people repealed, as in this case.

Judge Cooley, in his work on Constitutional Limitations, at page 355, after saying that "due process of law" is *not confined to ordinary judicial* proceedings, but extends to all cases where property is sought to be taken or interfered with, says, that "due process of law in each particular case means such an exertion of the powers of government, as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs." This definition of the term is accepted by the Court as correct in *Westervelt* vs. *Gregg* (12 N. Y., 209). (Political Code of Cal. § 6.)

The terms "law of the land," says Chief Justice Hemphill in *James* vs. *Reynolds* (2 Tex., 251), "have often been construed and somewhat variously defined. They are now, in their most usual acceptation, regarded as *general public laws*, binding upon all the members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals."

Under this last definition, even if Section 329 of the Political Code of California did operate to continue the "old law" in force, as claimed by the Attorney General, such section being applicable only to a certain class of individuals, it might be claimed that plaintiff in error could not be executed under it without being deprived of his life "without due process of law."

This leads to the inquiry as to what a *general* law is. In Potter's Dwarris, 52, we find the following definition: "That public acts relate to the public at large, and private acts concern the particular interest or benefit of certain individuals, or *particular classes of men.*" In Smith on Con. Const., Section 795, p. 913, we find: "The general description of public acts is that they relate to or concern the interests of the public at large, or relate to a general *genus* in relation to things, and private acts relate to private individuals, or an individual only, or which concern a particular *species* of such general *genus* or things."

McKinstry, J., in *Ex parte* Westerfield (55 Cal., 550), says: "It may be true that it [the law] bears equally upon all to whom it is applicable, but this does not make it a general law, for if that was the test there could be no special laws."

In *Van Zandt* vs. *Waddell* (2 Yerger, Tenn., 268), it is said: "That a law which is partial in its operation, intending to affect particular individuals alone, or to deprive them of the benefits of the general laws, is inhibited by the Constitution, and is void."

But, besides the lack of "due process of law" in this case, is the fact that the natural and fundamental rights and immunities of the plaintiff in error to be secure in his life and in the pursuit of happiness, is being threatened, notwithstanding the provision of the Federal Constitution contained in the fourteenth amendment, that being a citizen of the United States, his privileges and immunities shall not be abridged by any State.

The next proposition suggested by the Attorney General, in his brief upon the motion to dismiss, is that because the State Court has decided black to be white, this Court cannot interfere. I submit there is no such rule applicable where the life of a citizen of the United States is threatened by a State or its officers, legislative, executive or judicial, *without authority of law.* Suppose a State Court should decide that a State statute which read, that "every person convicted of battery shall be imprisoned in a county jail for not more than three months," authorized the Sheriff at the end of such three months to hang the prisoner by the neck until dead, would this Court sit idly by and permit such an outrage to a citizen of the United States to be consummated? If so, what benefit do citizens of the United States derive from being citizens thereof? (See point V in brief of plaintiff in error on main case.)

In the first place, the rule that the Federal Courts will follow the decisions of the State Courts, applies to *trials at common law* in such Federal Courts, and not to writs of error or appeals in criminal cases. It will be well to look into the classes of cases in which the Federal Courts have held themselves bound to follow the decisions of the State Courts and those in which they have held themselves not bound so to do. The doctrines relating to this subject are to be found in the 34th Section of the Judiciary Act of 1789, which is literally re-enacted in Section 721 of the Revised Statutes of the United States, and in the decisions of the Federal Courts construing that Act. The statute in question is as follows: "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision *in trials at common law* in the Courts of the United States in cases where they apply." The statute provides for rules of decision only *in trials at common law.* This excludes on the one hand criminal trials, and on the other, suits in equity and in admiralty.

Bucher vs. *Cheshire Ry. Co.* (125 U. S. 555). The only crimes that can be *tried* in the United States Courts are statutory and not common law crimes. (12 How., 361 ; 13 How., 268 ; 3 Wheat., 212 ; 128 U. S., 212.)

Again, in *Swift* vs. *Tyson* (16 Pet., 1), a leading case upon the subject, when speaking of the word "laws," as occurring in the 34th Section of the Judiciary Act, Story, J., said : "In the ordinary use of language, it will hardly be contended that *the decisions of Courts constitute laws.*"

The decisions of the Federal Courts hold that the decisions of the highest Court of a State, construing the statutes or Constitution of that State, are binding upon the Federal Courts *sitting in that State* when the like question comes before them. (*Thatcher* vs. *Powell*, 6 Wheat., 119 ; *Luther* vs. *Borden*, 7 How., 1 ; *Nesmith* vs. *Sheldon*, *id.*, 812 ; *Van Renselear* vs. *Kearney*, 11 How., 290 ; *Jefferson Br. Bk.* vs. *Skelly*, 1 Bl., 436 ; *Nichols* vs. *Levy*, 5 Wall., 433 ; *Bacon* vs. *Ins. Co.*, 131 U. S., 258 ; *Burgess* vs. *Seligman*, 107 U. S., 20 ; *Enfield* vs. *Jordan*, 119 U. S., 680 ; *Jencks* vs. *Quidnick*, 10 Sup. Ct. Rep., 655 ; *Union Nat. Bk.* vs. *Bk. of Kansas City*, 10 Sup. Ct. Rep., 1,013 ; *Hancock* vs. *Louisville & N. Ry. Co.*, 12 Sup. Ct. Rep., 969 ; 2 Bl., 599 ; 16 How., 275 ; 92 U. S., 494 ; 15 How., 421.)

Certainly in a case where the life of a citizen of the United States is unlawfully threatened by State authority, whether legislative, executive or judicial, as in this case, the Federal Courts will not consider themselves bound to decide in accordance with a decision of the State Court which upon its face shows that it is wholly and unquestionably erroneous. A decision of a State Court that black is white does not and cannot make it white. Again, as will be seen by what is hereinafter contained, the State Court in *this* case did more than to merely construe a State statute. They interpolated into such statute words and language which it did not contain, and from such interpolation produced the result at which they arrived, a right which they themselves in other cases have unequivocally stated they did not have.

A Court must take the law as it is written, and has no more right to interpolate something into a statute than to leave something out. In the case of *City of Eureka* vs. *Diaz* (89 Cal., 469), the Court says :

"It is a cardinal rule in the construction of statutes that the intent of the legislators should be followed, but this is subject to the *imperative* and *paramount* rule that the Court *cannot depart* from the meaning of language which is free from ambiguity, although the consequences would be to defeat the act. The Court knows nothing of the intention of an act except from the words in which it is expressed, * * * the meaning of the law being the law itself. * * * Every departure from the clear language of a statute is in effect an assumption of legislative powers by the Court. (Endlich on Interpretation of Statutes.)"

In *Smith* vs. *State* (66 Md., 217), the Court said : "Even when a Court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity."

In *Green* vs. *Wood* (7 Ad. & Ell. N. S., 185), Lord Denman says : "Those who used the words thought they had effected the purpose intended. But we, looking at the words as judges, are no more justified in *introducing* that meaning than we should be if we *added* any other pro-

vision. We can do no more than give such a meaning as the words authorize."

The Supreme Court of Ohio, in *Woodbury* vs. *Barry* (18 Ohio, 462), says: "It is our legitimate function to interpret legislation, but not to supply its omissions."

In *City of Eureka* vs. *Diaz* (89 Cal., 469), the Court says: "We have no more right to eliminate words from the ordinance than we have to *enlarge* its terms."

In this case, a careful reading of the decision of the State Court here under review (Rec., p. 111, fol. 333), will show not only that such Court interpolated words into Section 329 of the Political Code of California to give it the meaning they did, but that the entire argument and reasoning by which they arrive at the conclusion reached is specious and does not support such conclusion. Upon this proposition I refer to the points and authorities set forth in the original brief of plaintiff in error herein, under and in support of the Fifth Assignment of Error.

In analyzing the opinion last referred to, we find the following: The learned Judge who wrote the opinion of the Court says (Rec., p. 114, fol. 340): "The saving clauses in the legislation of the various States which have enacted them are *all somewhat different* from each other *and from Section 329 of our Political Code;* but they all have the same general purpose." Then the learned Judge proceeds to quote from statutes of a kindred nature in other States, *no one of which* is similar in its phraseology to Section 329 of the Political Code of California. (Rec., p. 114, fols. 341 and 342.) *e. g.* In GEORGIA the language employed is: "All crimes and offenses committed shall be prosecuted and punished under the laws in force at the time of the commission of such crime or offense, notwithstanding the repeal of such laws before such trial takes place."

In ARKANSAS the language is: "When any criminal or penal statute shall be repealed, all offenses committed or forfeitures incurred under it while it was in force shall be punished or enforced as if it were in force, notwithstanding such repeal, unless otherwise expressly provided in the repealing statute."

And in IOWA the language is: "The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceedings commenced under or by virtue of the statute repealed."

All of such quoted statutes *differ materially* from the statute of California, sought by the State Court to be converted into a saving clause to the "new law" in question herein, or the law relating to the *modus operandi* of executing a death penalty. That statute, Section 329 of the Political Code of California, reads:

"The repeal of any law *creating a criminal offense* does not constitute a bar to the indictment or information and punishment of an act already *committed in violation of the law so repealed*, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act." (See pp. 13, 14 and 15 of brief filed herein by plaintiff in error upon the main case.)

The learned Judge then proceeds to reason out the conclusion reached by him, but assumes in his argument *false premises.* He states first (Record, p. 115, fol. 344), that "the contention is that a law repealing the *punishment* of an offense is not to be brought within the meaning of a law repealing a law 'creating' an offense." This is not the fact. No

such contention was made. The contention that was made, and that is now made, is, that the repeal of a law providing for the mere machinery for or *modus operandi* of executing a penalty (which penalty itself was not repealed), does not fall within the meaning of the statute last above quoted. As stated in the original brief of plaintiff in error, filed herein, the definition of the crime of murder was not interfered with by the "new law;" neither was the penalty for such crime disturbed. The penalty or punishment stands as it always did, either death or imprisonment for life; it was *only* the mode of executing the death penalty that was repealed by the "new law." Therefore, upon the argument of the learned Judge himself, the law *creating* the crime, *i. e.*, the definition and the punishment, was not repealed, but the *mode* of executing *one* of such penalties was repealed, and, as a consequence, the only penalty which can *lawfully* be imposed is that of imprisonment for life. The laws repealed by the amendments of 1891 were *not* the laws which either denounced the acts constituting the crime of murder, nor were they the laws which affixed the penalties to such acts.

The learned Judge then states (Record, p. 115, fol. 344), as follows: "It is sufficient to say that when the appellant committed the crime of which he was convicted, certain sections of the Penal Code provided for the death penalty." This is a false starting point, for, as said before, the repealed sections did *not* prescribe the penalty; they *only* provided the *method* of carrying out *one of the penalties*. The *punishment* still stands; it is *only* the *mode* of executing that punishment, or rather one of two punishments, that has been repealed.

Again, the learned Judge seems to have overlooked entirely the words of Section 329 of such Political Code, which say that such a repeal shall not be a bar to the prosecution and punishment of "an act committed *in violation of the law repealed.*" The law *repealed* in this case did *not* in any manner *provide* either for the prosecution or the *punishment of any act*, consequently, no act *could* have been committed *in violation of its provisions*. IT provided solely for the machinery by which ministerial officers could execute denunciatory and penal laws.

The assignments of error in the record herein and the brief of plaintiff in error, filed upon the main case herein, show that the argument of the Attorney General, at the commencement of page 5 of his brief on this motion, is without foundation. (Brief of plaintiff in error, on main case, pp. 14, 15 and 21.) It does appear by the record, not only that a Federal question was presented, but that it entered into and formed a part of the foundation for the decision rendered by the State Court and here under review. (Rec., 69, 70, 91, 111, 112, 118, 119, 120, 121, 122, 123 and 128.)

The assertion of the Attorney General at the end of page 4 of his brief on this motion, he fails to support by a single authority, and as the same has already been covered herein I pass it by.

As to the points made in the Sixteenth Assignment of Error (Rec., p. 134–135) and the argument of the Attorney General thereon, I consider them already covered herein, and am willing to submit the same upon what I have already said, and upon the opinion of Justice Harlan in the Hurtado case (110 U. S., 516).

As to the bald and unsupported assertion of the Attorney General, with which he closes his brief, that the Writ of Error herein "was taken

for delay," I pass it without reply, for he has failed even to attempt to show its truthfulness.

The writ herein was taken because of a threatened deprivation of rights and immunities guaranteed to the plaintiff in error and to all citizens of the United States by the fourteenth amendment of the Constitution of the United States, and was issued, after a careful examination of his petition, by the late Justice Lamar, and a similar writ upon the *same* grounds was issued under similar circumstances for F. O. Vincent, by Justice Field of this Court. In view of these facts and the apparent change in the trend of opinion of the Court, as shown by the several dissenting opinions of Justices Field, Harlan and Brewer, hereinbefore alluded to, it seems to me that the plaintiff in error should at least be allowed a hearing upon the merits of the writ, and that the motion to dismiss and for affirmance, made by the defendant in error, should be denied.

Respectfully submitted,

CARROLL COOK,

For the Plaintiff in Error.

Mex. Cent. R.R. Co. vs Pinkney } decided
B. & O. R.R. Co. vs Baugh } May 1/93

Office Supreme Court U. S.
FILED.
APR 17 1893
JAMES H. McKENNEY,
CLERK.

No. .....

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

JOHN McNULTY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Brief in Support of Motion to Dismiss, and in Support of Motion to Affirm.

WM. H. H. HART, Attorney-General of California,
Attorney for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

JOHN McNULTY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief in Support of Motion to Dismiss, and in Support of Motion to Affirm.

In this case the defendant in error has made a motion to affirm, united with a motion to dismiss, for want of jurisdiction.

1. The plaintiff in error was convicted of murder, and sentenced to be hanged in the county jail in the City and County of San Francisco, in accordance with the statute of California then in force, requiring that execution for a capital offense should be by the Sheriff of the county, and in the county jail. (Record, p. 129.)

Subsequently, and after this cause had been appealed to the Supreme Court of California, and before a decision in that Court, a law was passed in that State directing that executions for capital offenses should be by the Warden of the State Prison, and in the State Prison.

The judgment of the Supreme Court of California, affirming the judgment commanding the execution of the plaintiff in error, was made on the ground that the law which was in force at the time he was convicted and sentenced to be executed remained in force as to offenses committed thereunder, and the Court came to this conclusion, in view of the provisions of Section 329 of the Political Code of California, which the Court regarded as a saving clause. That section reads as follows:

"The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment, information, or punishment is expressly declared in the repealing Act."

The opinion of the Court affirming the judgment is printed in the record in this cause, pp. 111–119, and is reported in Volume 93 of the California Reports, p. 427.

Thus it will be seen that the decision of that Court, which the plaintiff in error seeks to have here reviewed, related entirely to the question whether a certain statute of that State had been repealed, and not to any Federal question.

In the brief for plaintiff in error there are general statements, from which counsel would have it understood that in rendering the judgment

the State Supreme Court decided in respect to the validity of statutes of that State under the Constitution of the United States; but the brief does not point out what particular question is thus decided, nor under what particular provision of the laws of Congress it is claimed this Court has jurisdiction in this case.

In these general statements in the brief, counsel has included an opinion of that Court which has been set aside, and the opinion dissenting therefrom by a minority of the Court, but has not specified what Federal question he claims was decided in making the decision and judgment which is now in force, and which is the only one to be considered. This decision is that which is contained in the record, pp. 111–119, in which it was held, as above explained, that there existed a section in the California Statutes (said Section 329 of the Political Code), which continued statutes in force for the punishment of offenses committed under those statutes; and it appears from this opinion that there was nothing decided in relation to the constitutionality of any law, nor any Federal question whatever decided; but simply that one California statute had not been repealed by another, as to offenses committed under the former, and placing the decision upon the ground that there existed a section in the California Statutes in the nature of a saving clause in respect to offenses previously committed, being a question only for the State Court to determine, and not reviewable in this Court.

Neither would the plaintiff in error be in any better position had the first decision made by that Court been permitted to stand. That opinion is published in the record, pp. 70–91, and was to the effect that the last law, and which is termed in the brief for the plaintiff in error, p. 4, the "new law," was unconstitutional, and, consequently, did not repeal the law under which the plaintiff in error had been tried, convicted, and sentenced. That decision resulted likewise in an affirmance of the judgment against McNulty.

That decision, also, had it not been set aside, was not reviewable in this Court, the law of Congress being that it is only where a State Court has decided IN FAVOR OF THE VALIDITY of a State statute, where its validity is drawn in question as being repugnant to the Constitution of the United States, that this Court has jurisdiction to review the decision. (U. S. Rev. Stats., Sec. 709). But that decision was against the validity of the new law.

There was no question made at any time in this case against the validity of the law under which McNulty committed the offense and was tried and sentenced, but the only question was whether that law had been repealed by this later law, and in the first opinion of the California Supreme Court, printed in the record, pp. 70–91, it was held that the old law had not been repealed by the new law, which was decided to be unconstitutional.

Afterwards, a rehearing was granted (Record, p. 111), and again that Court held that the old law had not been repealed as to offenses committed under it, and thus held because of the saving clause in that section (329). Under both of these opinions the result was the same; that is, that he should be executed under the old law—the law in force at the time he committed the offense charged—and in the place, mode, and manner, as it would have been if the new law had not been passed.

In the brief of the plaintiff in error, p. 8, is the following:

"In this case, our first claim on behalf of the plaintiff in error is, that having been convicted of the crime, to wit: murder in the first degree, before the present law relative to executions became a law, he cannot legally or constitutionally be executed under it."

This observation is entirely foreign to the case. As above explained, the judgment is not that the plaintiff be executed under the new law, but that he be executed according to the law in existence at the time of the commission of the offense of which he was accused and found guilty.

This case is unlike that of *ex parte Medlay*, reported in 134 U. S. 160. There Medlay was sentenced to be executed under a law which was enacted after he had committed the offense, and it was held by this honorable Court that the law under which he was thus sentenced inflicted a greater punishment than that under which the offense was committed, and was, therefore, in its nature *ex post facto* within the meaning of Section 10, Article I, of the Constitution of the United States.

In this case, the plaintiff in error has not been sentenced under a law enacted after the offense was committed, but under the same law which was then in force, the Court holding that said Section 329 continued the former law in force for the punishment of offenses committed thereunder.

Therefore, the proposition attempted to be presented to this Court by the assignment of error (Record, pp. 128–136), that to execute the plaintiff in error under a law passed after he committed the offense would be in violation of Section 10, Article I, of the Constitution of the United States, declaring that no State shall pass any bill of attainder or *ex post facto* law, has no application to this case, as the judgment does not direct his execution in the State Prison, or by the Warden of the State Prison, or at all in accordance with the new law, but by the Sheriff of the county, and in the county jail, under the law existing and as it existed at the time of the commission of the offense.

Whether, under a proper construction of the statutes of California, the law in force at the time the offense was committed was wholly repealed by the subsequent law, or was continued in force as to offenses committed thereunder by that section (329) of the Political Code, is a question solely for the State Courts to determine, and not a question of which this Court has jurisdiction.

As the Supreme Court of California decided that the plaintiff in error should be executed in the manner prescribed by the law in existence when he committed the offense, it is not material to inquire whether the subsequent law increased the punishment for a capital offense.

The State Court, by its judgment, has not attempted to enforce against the plaintiff in error an *ex post facto* law, and there cannot, therefore, be any question in this case concerning a law of that nature.

2. Neither would the execution of the plaintiff in error, in obedience to the judgment of the State Court, be depriving him of life without due process of law.

In the opinion in *Hurtado* vs. *California*, 110 U. S. 516, there is a very full exposition of the meaning of the words "due process of law."

The following is from page 527 of that opinion:

"Mr. Reeve, in 2 History of Eng. Law, 43, translates the phrase *nisi per legale judicium parium suorum vel per legem terræ:* 'But by the judg-

ment of his peers, or by some other legal process or proceeding adapted by the law to the nature of the case.'

"Chancellor Kent, 2 Com. 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to Lord Coke's comment upon it, he says: 'The better and larger definition of due process of law is that it means law in its regular course of administration through Courts of justice.'

"This accords with what is said in *Westervelt* vs. *Gregg*, 12 N. Y. 202, by Denio, J., p. 212: 'The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government.'"

On page 534 of that opinion is given an extract from the opinion by Justice Miller, in *Davidson* vs. *New Orleans*, 96 U. S. 105, reading as follows:

"It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State a fair trial in a Court of justice, according to the modes of proceeding applicable to such a case."

The following is from pages 535, 536 of 110 U. S.:

"Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation."

Tested by these definitions of what is due process of law, the execution of the plaintiff in error would be by such process.

He has been convicted and sentenced in the regular course of administration of law in Courts of justice, after a trial according to the usual mode of proceeding applicable to such a case.

In the assignment of errors it is asserted (page 129 of the record) that the statutes under which the plaintiff in error was accused, tried, convicted, and sentenced to be hanged, were absolutely and completely repealed without any saving clause.

The Supreme Court of California decided otherwise, and there is no complaint that the plaintiff in error did not have an opportunity to have his case duly presented to that Court, and the enforcement of the judgment thus given would be due process of law.

The plaintiff in error cannot, in this Court, controvert the correctness of the judgment of the Supreme Court of California as to the construction given by that Court to the California statutes in holding that the statute under which he was prosecuted, convicted, and sentenced has not been repealed as to offenses committed under it, such decision not being upon a Federal question.

The question whether a statute of a State has been repealed by a subsequent statute, is purely a question for the cognizance of the State Court, and not a question of which this Court has jurisdiction.

The following is from the opinion in *Blount* vs. *Walker*, 134 U. S. 614:

"To give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. (*New Orleans Waterworks Company* vs. *Louisiana Sugar Refining Company*, 125 U. S. 18, 29; *Klinger* vs. *Missouri*, 13 Wall. 227, 263; *Desaussure* vs. *Gaillard*, 127 U. S. 216; *Hopkins* vs. *McLure*, 133 U. S. 380.)"

3. Assignment of error XVI, pp. 134–135 of Record, is as follows: "That it appears upon the face of the judgment in said cause, and in the record herein, that said McNulty has never been legally or otherwise indicted or presented by any grand jury, and that he has been proceeded against by information made and filed by the District Attorney of the City and County of San Francisco, and it does not appear by said judgment, or by said record prior to the filing of such information, he had had a legal or any examination before, or that he had been legally or at all committed by any magistrate. On the contrary, such information was filed without any legal examination and commitment, and without any examination and commitment at all by any magistrate."

There is no merit in this, for the following reasons:

First—No such point was made or decided in the State Court.

To be reviewable in this Court, the right, privilege, or immunity must have been set up or claimed at the proper time in the proper way in the State Supreme Court, and the decision must be against the right so set up or claimed.

Spies vs. *Illinois*, 123 U. S. 181.

Second—It does not appear from the record that there was not a legal examination and commitment.

Under the Penal Code of California, to raise the question in the Supreme Court that there had not been an examination and commitment preliminary to the filing of an information, it would be necessary to present the question by motion in the trial Court, and, on the denial of the motion, to incorporate the same, accompanied by a statement that there had not been an examination and commitment, in a bill of exceptions, so as to have the same appear in the record, otherwise it would not appear in the record before the Supreme Court whether there had or had not been an examination and commitment, as the papers showing the examination and commitment do not, under the statutes of California, constitute any part of the usual record. The following is from the Penal Code:

"SEC. 1207. When judgment upon a conviction is rendered, the Clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, if one, and must, within five days, annex together and file the following papers, which will constitute a record of the action:

"1. The indictment or information, and a copy of the minutes of the plea or demurrer;

"2. A copy of the minutes of the trial;

"3. The charges given or refused, and the indorsement thereon; and,

"4. A copy of the judgment."

Section 1246 of the Penal Code directs what shall be transmitted to the Supreme Court of the State on appeal in a criminal case, as follows:

"SEC. 1246. Upon an appeal being taken, the Clerk with whom the notice of appeal is filed, must, within ten days thereafter, in case the bill of exceptions has been settled by the Judge before the giving of said notice, but if not, then within ten days from the settlement of the bill of exceptions, without charge, transmit to the Clerk of the appellate Court a copy of the notice of appeal, and of the record, and of all bills of exceptions, instructions, and indorsements thereon; and, upon the receipt thereof, the Clerk of the appellate Court must file the same and perform the same services as in civil cases, without charge."

In the record in this case, no bill of exceptions appears to show that the plaintiff in error was not examined and committed, or that any point was made in the State Court in that regard.

It is decided in *Hurtado* vs. *People of California*, 110 U. S. 516, that the words "due process of law," in the Fourteenth Amendment of the Constitution of the United States, do not necessarily require an indictment by grand jury in a prosecution by a State for murder.

It is respectfully submitted that the motion to dismiss the writ of error should be sustained.

If, however, a Federal question was or is involved, and if this Court on the record has jurisdiction, then I submit the judgment of the State Court should be affirmed, because the writ of error was taken for delay and not because of sufficient grounds.

WM. H. H. HART,
Attorney-General of the State of California,
Attorney for the Defendant in Error.

1349,648

No. .....

Office Supreme Court U. S.
FILED.
APR 17 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

F. O. VINCENT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief in Support of Motion to Dismiss, and in Support of Motion to Affirm.

WM. H. H. HART, Attorney-General of California,
Attorney for Defendant in Error.

Section 1246 of the Penal Code directs what shall be transmitted to the Supreme Court of the State on appeal in a criminal case, as follows:

"SEC. 1246. Upon an appeal being taken, the Clerk with whom the notice of appeal is filed, must, within ten days thereafter, in case the bill of exceptions has been settled by the Judge before the giving of said notice, but if not, then within ten days from the settlement of the bill of exceptions, without charge, transmit to the Clerk of the appellate Court a copy of the notice of appeal, and of the record, and of all bills of exceptions, instructions, and indorsements thereon; and, upon the receipt thereof, the Clerk of the appellate Court must file the same and perform the same services as in civil cases, without charge."

In the record in this case, no bill of exceptions appears to show that the plaintiff in error was not examined and committed, or that any point was made in the State Court in that regard.

It is decided in *Hurtado* vs. *People of California*, 110 U. S. 516, that the words "due process of law," in the Fourteenth Amendment of the Constitution of the United States, do not necessarily require an indictment by grand jury in a prosecution by a State for murder.

It is respectfully submitted that the motion to dismiss the writ of error should be sustained.

If, however, a Federal question was or is involved, and if this Court on the record has jurisdiction, then I submit the judgment of the State Court should be affirmed, because the writ of error was taken for delay and not because of sufficient grounds.

WM. H. H. HART,
Attorney-General of the State of California,
Attorney for the Defendant in Error.

Office Supreme Court U. S.
FILED.
APR 17 1893
JAMES H. McKENNEY,
CLERK.

No. .....

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

F. O. VINCENT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief in Support of Motion to Dismiss, and in Support of Motion to Affirm.

WM. H. H. HART, Attorney-General of California,
Attorney for Defendant in Error.